167-681

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. ~~1035~~ ~~620~~ 281

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MAY 27, 1895.

(15919)

( )

SUPREME COURT OF THE UNITED STATES

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BROOKE MACKALL, APPELLANT,

vs.

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In the Court of Appeals of the District of Columbia.

BROOKE MACKALL, Appellant,
vs.
WESTEL WILLOUGHBY. } No. 447.

a Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY
vs.
BROOKE MACKALL, THE MUTUAL FIRE Insurance Co. of the District of Columbia, Samuel C. Wilson, Trustee, & Leonard Mackall, Trustee, & Oliver T. Thompson, Trustee. } In Equity. No. 12521.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Amended Bill of Complaint.*

Filed May 12, 1892.

Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY
vs.
BROOKE MACKALL, THE MUTUAL FIRE Insurance Co. of the District of Columbia, Samuel C. Wilson, Trustee, & Leonard Mackall, Trustee, & Oliver T. Thompson, Trustee. } In Equity. No. 12521.

The complainant, Westel Willoughby, brings this his amended bill filed against the above-named defendants by leave of this court and says:

First. That on the 10th day of April, A. D. 1883, by an agreement of that date, signed and sealed by both plaintiff and defendant, the said defendant, Brooke Mackall, in consideration of services of complainant as counsel in the case of Alfred Richards & others

v. Brooke Mackall & others, No. 2373, in equity, then pending in the Supreme Court of the United States, and in Brooke Mackall and others *v.* Alfred Richards and others, No. 8118, in equity, and in Leonard Mackall and others *vs.* Brooke Mackall, Jr., No. 8038, in equity, the last two then pending but not having been heard in the special term of the court, and the said complainant agreeing to conduct the said suit No. 2373 to a determination of the points then pending and the said suits Nos. 8118 and 8038 to hearing in
2 special term, agreed to pay to the complainant for such services a sum equal to fifty per cent. of such sum as might be adjudged to the said B. Mackall, Jr., and which might be recovered in said suit No. 8118 by way of mesne profits, damages, and costs, provided that if such fifty per cent. be less than $5,000.00 the complainant was to have such sum of $5,000.00, said compensation to be in full of the said services in No. 2373 up to the decision of the Supreme Court of the United States on the points then pending therein and services in Nos. 8118 and 8038 up to and including the hearing in the special term, and for these services said complainant was by said agreement to have a lien upon said judgment and property as might be recovered against the said Alfred Richards. Copy of the said agreement is filed with original bill and prayed to be made a part of this bill as Exhibit "A."

Second. That the complainant performed all the work re*q*uired of him by the terms of said sealed agreement, and no payment has been made complainant on account of said agreement.

Third. That — the equity cause No. 8118, which was a suit by Brooke Mackall against Alfred Richards to set aside a conveyance of the land on which the Palace Market building stands, on lot 7, in square 223, in the city of Washington, D. C., as described in said agreement, and to recover mesne profits thereof of over $20,000.00 received by said Richards, a decree was entered at special term, April 12, 1883, dismissing the bill with costs, which decree was finally affirmed by the Supreme Court of the United States, and there was no recovery of mesne profits in said cause.

Fourth. That equity cause No. 8038 was argued by coun-
3 sel at special term in January, 1884, was then certified to the general term, to be there heard in the first instance, where a decree was rendered sustaining the title in Brooke Mackall as to all of lot seven (7), square 223, except that part on which the Palace Market building stands, which decree was finally affirmed in the Supreme Court of the United States.

Fifth. Said equity cause No. 2373 was decided in the Supreme Court of the United States Nov. 24, 1884, upon the points pending therein at the date of said sealed agreement; that the result of the said decision was that the said Brooke Mackall recovered in said cause against the said Alfred Richards all that part of lot seven (7), in square 223, lying north of a line beginning at a point 14 feet south of the northeast corner of said lot on Fourteenth street and running thence parallel to New York avenue to the west line of said lot, except the ground upon which the Palace Market building

stands, such recovery being of the value of more than $50,000 at the time thereof.

Sixth. Complainant says that the said part of lot seven (7), in square No. 223, not occupied by the Palace Market building is charged with a deed of trust, executed by the said Brooke Mackall and the defendant Leonard Mackall, as trustee, on or about Nov. 30, 1887, to secure the payment of $30,000,00 and interest thereon from that time, no part of which has been paid, to the Mutual Fire Insurance Company of the District of Columbia, in which deed of trust the defendant Samuel C. Wilson and defendant Oliver T. Thompson are the trustees holding the legal title, and the
4 said property is heavily incumbered by taxes unpaid. Although said deed of trust is executed by the said Leonard Mackall, named as defendant, he did not then have and has not now any title, legal or equitable, to the said property. The said deed of trust is recorded in Liber No. 1291 of the land records of the District of Columbia, at page 356, &c., and is prayed to be made a part of this bill of complaint.

Prayers.

First. The complainant prays that Brooke Mackall, The Mutual Fire Insurance Company of the District of Columbia, Samuel Wilson, trustee; Oliver T. Thompson, trustee, and Leonard Mackall, trustee, may be made parties defendant hereto, and that proper process of subpœna may issue commanding them to appear and abide by the orders and decrees of the court in this cause.

Second. That decree be made herein that the said defendant, Brooke Mackall, is indebted to the complainant for the sum of $5,000.00, with interest thereon from November 24, 1884, and that the parts of the said lot seven (7), in the square 223, described in paragraph 5 herein be charged with the payment thereof.

Third. That discovery be made of the amount due and unpaid upon the said deed of trust to the said Mutual Fire Insurance Company of the District of Columbia.

Fourth. That a decree may be passed for the sale of the said lot seven (7), in square 223, outside of that part upon which the building known as the Palace Market building stands, under the direction of the court and by an officer or officers appointed
5 thereby, and that the proceeds of such sale be applied to the payment of the costs and expenses of the sale and then to the payment of the liens existing thereon, including whatever may be due under the said deed of trust and which may then remain unpaid, and then to the payment of the said sum of $5,000.00, with the interest as herein claimed, besides costs, the balance to be disposed of as the court may direct.

Fourth. That the complainant may have such other and further relief as the nature of the case may require.

A. A. BIRNEY,
Counsel for Complainant.

Demurrer of Defendant.

Filed May 26, 1892.

Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant, *vs.* BROOKE MACKALL *et al.* } Equity. No. 12521.

The defendant Brooke Mackall, not admitting any of the matters and things set forth in the bill to be true as therein stated, doth demur thereto, and for grounds of demurrer says:

(1.) That the complainant has not in and by his said bill stated any valid ground of complaint against this defendant.

(2.) That the remedy of complainant, if any he hath, is at law and not in equity.

(3.) That complainant is not entitled to any lien as prayed in said bill.

6 (4.) That the averments of the bill herein do not entitle complainant to any relief herein as against this defendant.

SHELLABARGER & WILSON,
Solicitors for Defendant.

We hereby certify that in our opinion the foregoing demurrer is well founded in law.

SHELLABARGER & WILSON,
Solicitors for Defendant.

DISTRICT OF COLUMBIA, *ss:*

Brooke Mackall, party defendant in above-entitled case and who, through his solicitors, files the foregoing demurrer, being duly sworn, deposes and says that said demurrer is not interposed for the purpose of delay.

BROOKE MACKALL.

Subscribed and sworn to before me this 24th day of May, A. D. 1892.

EDMUND VAN DYKE,
[SEAL.] *Notary Public, D. C.*

Decree Sustaining Demurrer, &c.

Filed July 13, 1892.

In the Supreme Court of the District of Columbia.

WILLOUGHBY, Compl't, *v.* MACKALL *et al.*, Defendants. } Equity. No. 12521.

This cause coming on to be heard upon the demurrer of
7 Brooke Mackall, the above-named defendant, to the amended bill of complaint filed herein, and the same being argued by

counsel for the respective parties, submitted, and by the court considered—

It is, this 13th day of July, A. D. 1892, adjudged, ordered, and decreed that the demurrer of said defendant, Brooke Mackall, be sustained, and that the amended bill of complaint herein be, and the same is hereby, dismissed with costs.

A. C. BRADLEY, *Justice.*

Decree.

Filed November 24, 1893.

Court of Appeals of the District of Columbia, No. 112, November Term, 1893.

WESTEL WILLOUGHBY, Appellant, vs. BROOKE MACKALL.	(Equity. 12521.)

Transferred from the supreme court of the District of Columbia pursuant to act of Congress of February 9th, 1893.

This cause came on to be heard on the record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings to be had therein not inconsistent with the opinion of this court.

[SEAL.] Per Mr. JUSTICE SHEPARD.

November 8, 1893.

A true copy.
Test:

ROBERT WILLETT, *Clerk.*

Costs, $5.20.

Disclaimer of Certain Defendants.

Filed January 11, 1894.

Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY vs. BROOKE MACKALL, THE MUTUAL FIRE INSURANCE COMPANY of the District of Columbia, SAMUEL C. WILSON, Trustee; OLIVER T. THOMPSON, Trustee; LEONARD MACKALL, Trustee.	Equity. No. 12521.

The defendants in the above cause whose names are subscribed hereto, for answer and disclaimer to the amended bill filed herein, say—

That the amount charged in said amended bill to be due
9 to the Mutual Fire Insurance Company of the District of Columbia has been fully paid, satisfied, and discharged, and the said deed of trust securing the same has been released by the trustees named in the same.

Wherefore these defendants severally hereby disclaim all right, title, or interest in the property in controversy described in said bill or in any part thereof, and they pray to be hence dismissed.

TALLMADGE A. LAMBERT,
Solicitor for the Mutual Fire Ins. Co. of the District of Columbia, Samuel C. Wilson, Trustee, and Oliver T. Thompson, Trustee.

WESTEL WILLOUGHBY
vs. } 12521.
BROOKE MACKALL *et al.*

The clerk will enter a discontinuance as to the defendant Leonard Mackall, trustee.

Entered January 11, 1894.

A. A. BIRNEY,
Solicitor for Complainant.

Discontinuance as ordered entered.

BY THE CLERK.

'94, 1, 11.

10 *Answer of the Defendant to Amended Bill.*

Filed February 12, 1894.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
against } Equity. No. 12521.
BROOKE MACKALL and Others, Defendants.

The answer of the defendant Brooke Mackall to the amended bill of complaint in the above-entitled cause.

The said defendant, saving and reserving to himself the benefit of all and all manner of objection that may or can be taken to the said bill of complaint and to the many errors, uncertainties, and imperfections therein contained, nevertheless, for answer thereunto or unto so much and such parts thereof as he is advised it is material and necessary for him to answer, answering, says:

1. He admits the execution by him of the certain agreement of the 10th day of April, A. D. 1883, in the first paragraph of the said amended bill mentioned and purporting therein to be described, and he believes that the Exhibit A accompanying the said amended bill is a true copy of the said agreement, but for greater certainty he refers to the original thereof.

2. He denies the allegations of the second paragraph of the said bill, except as the same may hereinafter be in anywise admitted.

11 3-4. He admits the allegations of the third and fourth paragraphs of the said bill to be substantially true, but for greater certainty he refers to the record and proceedings in the certain causes numbered 8118 and 8038, in equity, in the supreme court of the District of Columbia, in the said third and fourth paragraphs respectively mentioned.

5. He admits that the certain equity cause numbered 2373 in the fifth paragraph of the said bill mentioned was decided in the Supreme Court of the United States on or about November 24th, 1884, upon the points pending therein at the date of the said agreement aforesaid, but that the result of the said decision was that this defendant, according to the true meaning, intent, and purpose of the said agreement or in any proper sense, recovered any property in said cause against the certain Alfred Richards therein mentioned he denies.

6. He is advised that in the present state of this cause it is unnecessary for him to answer the allegations of the sixth paragraph of the said amended bill.

7. And, further answering, this defendant says that at the time of the making of the certain agreement aforesaid the complainant was and continuously for a long time prior thereto, to wit, since the month of July, A. D. 1877, had been in sundry matters the attorney and counsellor at law and legal adviser of the defendant, who is a layman unlearned in the law; that as such attorney and counsellor at law and legal adviser of the defendant the complainant had acquired and possessed the defendant's implicit confidence, and the defendant wholly relied upon

12 him, the complainant, in all matters of a legal nature affecting him, the defendant; that among the matters in and about which the complainant so was and had been the defendant's attorney and counsellor and legal adviser as aforesaid were the three certain causes in the said covenant or agreement mentioned, to wit, the certain causes numbered 2373, 8038, and 8118, in equity, in the supreme court of the District of Columbia, in which the complainant was and had been the attorney of record of the defendant as follows, namely, in the said cause numbered 2373 since, to wit, the 9th day of July, A. D. 1877, in the said cause numbered 8038 since, to wit, the 25th day of April, A. D. 1882, and in the said cause numbered 8118 since, to wit, the 11th day of April, A. D. 1882, and at the date of the said covenant or agreement the complainant was exclusively in charge of the defendant's several interests in each and all of the said causes, which interests were very great and of great importance to the defendant, involving as well his character as his estate; that at the date of the said covenant or agreement the condition of the said several causes was as follows, namely, the said cause numbered 2373 was pending on appeal in the Supreme Court of the United States, the said cause numbered 8038 was pending in the supreme court of the District of Columbia,

not matured for hearing, and the said cause numbered 8118 was on the calendar for hearing in the supreme court of the District of Columbia, holding a special term for equity business, and was on the assignment for hearing or about to be put on said assignment, the said cause having been in fact determined by decree by
13 said court, holding said special term, on the 12th day of April, A. D. 1883; that on the day of the making of said covenant or agreement, which was the day of the date thereof, the complainant, who personally prepared the same, presented it to the defendant and exacted by him its execution of him as a condition of his, the complainant's, continuing to act as the defendant's attorney and counsellor in the said causes, and especially of his arguing the said cause numbered 8118, in which the complainant had filed the bill and ever been the defendant's sole attorney and legal adviser; that at the same time the complainant stated to the defendant, and the defendant accordingly fully believed, that the meaning and effect of the said covenant or agreement was intended to be and was such that if there should be recovered in the said cause numbered 8118 by the defendant herein nothing by way of mesne profits, damages, and costs the complainant was to receive nothing under the said covenant or agreement unless and except in accordance with the last paragraph thereof; that the defendant at the time was wholly without counsel or advice in the premises other than that given him by the complainant, and relying solely and confidently upon the advice and assurance of the complainant as aforesaid, and being under the necessity aforesaid of signing the said covenant or agreement or having the complainant abandon his, the defendant's, interest in the said causes, and especially in the said cause numbered 8118 on the eve of its hearing, he, the defendant, signed the said covenant or agreement, being actuated thereto by no other consideration than the advice, assurance, and necessity aforesaid, and that the complainant and the defendant never afterwards had
14 any other or further understanding or agreement as to any compensation to the complainant in respect of the said causes numbered 2373, 8038, and 8118, or any of them, than such as is expressed and contained in the said covenant or agreement. Wherefore the defendant says that the complainant is not entitled to maintain his said bill of complaint, and the defendant prays the same benefit of the matters herein in this paragraph set forth as though he had formally pleaded the same to the said bill.

8. That, as in and by the said agreement appears, it was contemplated that the said causes numbered 8038 and 8118 might not be finally determined in the court in which they were pending at the time of the making of the said agreement, and the fact is that the said causes were afterwards taken in due course on appeal to the Supreme Court of the United States; that it is true that the complainant conducted said causes numbered 8038 and 8118 through the supreme court of the District of Columbia, and also conducted the said cause numbered 8118 on appeal in the Supreme Court of the United States, but the complainant did not conduct the said cause numbered 8038 in the Supreme Court of the United States or have

any part therein in said court except as herein otherwise appears, and that as to the said cause numbered 8038, when the same was pending in the Supreme Court of the United States, the facts are as follows: The said cause was on the docket of said court for the October term, 1889, being numbered 159 on said docket. The said cause was on the call, or about to be put upon the call, for trial in said court on Monday, December 9th, 1889. A short time prior thereto the complainant proposed to the defendant certain
15 terms in respect of compensation of him, the complainant, for services as the defendant's attorney in the various matters and things in and about which the complainant had been such attorney, the terms of which proposition differed materially in the complainant's favor from those of the said agreement aforesaid, and the said proposition drew from the defendant the certain letter of December 6th, 1889, filed with the answer to the original bill herein and hereby referred to as part of this answer as though the same were herein at large set forth, all the facts and statements in which said letter are true. In reply to said letter the complainant wrote the defendant the letter dated December 7th, 1889, of which Exhibit B to the said answer to the original bill is a copy, and the same also is hereby referred to as part of this answer. Accompanying the said letter of the complainant was the paper-writing, of which Exhibit C to the said answer to the original bill is a copy, and which also is hereby referred to as part of this answer. As a result of the proposition of the complainant aforesaid and of the consequent correspondence between the complainant and the defendant aforesaid, and in accordance with the threat contained in the said letter of the complainant, the complainant refused to file the briefs which had been prepared for the presentation of the said case or to give the defendant for printing the reply brief mentioned in said letter, and which, as therein stated, the complainant considered indispensable to the proper presentation of the defendant's case, and also refused and forbore to represent the defendant in the said cause at that time. It there-
16 upon became necessary for the defendant to protect his own interests in said cause, and in his proper person he appeared before the said Supreme Court of the United States on said 9th day of December, 1889, and filed with said court the certain motion whereof a printed copy is filed herewith, marked Exhibit D, and prayed to be taken as part of this answer. Upon consideration of such motion the Supreme Court of the United States postponed said cause for hearing to a future day and the defendant was compelled to procure and did procure other counsel to represent him therein at a cost to the defendant of two thousand dollars, which he paid such counsel, but the complainant seeing the resolve and actions of the defendant in that behalf, and finding that his, the complainant's, attitude and conduct in the matter had wholly failed of their manifest purpose, and that he could gain no advantage by persisting in his said attitude and course of conduct, attended at the trial table while the said cause was being heard and claims to have been of assistance to the counsel so as aforesaid procured by the defendant by

conference, suggestion, and the like, but the defendant did not recognize the complainant as his counsel after said 7th day of December, A. D. 1889.

9. That afterwards, on, to wit, the 6th day of June, A. D. 1890, the complainant sued the defendant in assumpsit, in law cause No. 30611, in the supreme court of the District of Columbia, for legal services rendered the defendant in divers causes, suits, and business, including services as counsel in the said cause numbered 2373, in equity, in the supreme court of the District of Columbia, for
17 which he claimed fifty-five hundred (5,500) dollars, cause numbered 8038, in equity, in said court, for which he claimed ten thousand five hundred (10,500) dollars, and cause numbered 8118, in equity, in said court, for which he claimed twenty-five hundred (2,500) dollars, the said causes being the same as those mentioned in the agreement aforesaid; that to the declaration of the said complainant in the said cause numbered 30611, at law, the defendant pleaded, among other things, that he was not indebted as alleged by the complainant, and further as to the said three causes aforesaid that the complainant and the defendant had entered into the certain covenant or agreement of the 16th day of April, 1883, in the bill of complaint mentioned; that the said cause numbered 8118, in equity, aforesaid, was determined against this defendant, and that no recovery was had in the said cause; that the said cause numbered 8038, in equity, was certified to the general term of the supreme court of the District of Columbia, and was not there tried on appeal, and that the complainant, without any fault on the part of the defendant and without any reasonable excuse therefor, failed to keep and perform his said agreement, whereby this defendant said that he was not indebted as in the said cause numbered 30611, at law, alleged; that thereafter the said cause numbered 30611, at law, aforesaid, duly came on for trial and was duly tried by the said court and a jury, and that upon such trial the complainant obtained against the defendant a verdict for the sum of twelve thousand (12,000) dollars, with interest from the 6th day of May, A. D. 1890, and costs, for which said sum judgment was rendered by the said court against this defendant in the said cause,
18 and that the defendant paid and satisfied the said judgment in full on, to wit, the 6th day of August, A. D. 1892, and the same has been entered of record as satisfied, and that, except in so far as compensation for the services of the complainant to the defendant under the said covenant or agreement as aforesaid entered into and formed part of said judgment, the defendant has not paid the complainant anything under or on account of the said agreement; but the defendant claims that in law and in fact the rendition and payment of the said judgment under the circumstances makes the question of compensation between the complainant and the defendant in the premises *res judicata*, and that therefore the complainant ought not to maintain his said bill of complaint, and the said defendant claims the same benefit of this defence as though he had formally pleaded the same to said bill.

10. That according to the true intent and meaning of the said covenant and agreement aforesaid, as by reference thereto appears, the certain judgment and property contemplated to be recovered against the certain Alfred Richards therein mentioned were the judgment and property to be recovered against the said Richards in the said case numbered 8118 aforesaid and no other, and that, as hereinbefore set forth, the property involved in the said cause numbered 2373 aforesaid was not nor was any part thereof recovered against the said Richards. Wherefore the defendant says that the complainant is not entitled to any lien upon any of the property mentioned or referred to in said bill of complaint, or any part thereof.

19

11. The defendant refers to the records and proceedings in each and all of said causes aforesaid, to wit, cause numbered 2373 in equity; 8038, in equity; 8118, in equity, and 30611, at law, in the supreme court of the District of Columbia, and he prays leave to read at the hearing hereof so much and such parts thereof as may be deemed material and relevant.

12. That the said cause numbered 30611, at law, in the supreme court of the District of Columbia, was instituted by the complainant on the 6th day of May, A. D. 1890; that the original bill in this cause was filed on the 3d day of June, 1890; that the complainant also instituted against this defendant on the 12th day of October, 1892, in cause numbered 33387, at law, in said court, a suit upon the same covenant or agreement as in the bill of complaint in this cause set forth; that the defendant answered the original bill in this cause on the 13th day of June, 1890, and in his answer set up, among other things, the defence that the said agreement between him and the complainant as respects said cause numbered 8118 was in effect for a fee contingent upon success, whereas the complainant was unsuccessful in said cause and the same was lost to this defendant; that the reason the defendant did not set up the claim now set forth in paragraph 7 of this answer and in said cause numbered 33387, at law, to the effect that the said agreement was exacted by the complainant from the defendant under the circumstances in the said paragraph set forth, is that until it became necessary for the defendant to plead in said cause numbered 33387, at law, and to answer the amended bill in this cause the defendant always

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supposed that it was understood and assented to by the complainant that the said agreement was for a contingent compensation only, and that in that cause and in said cause numbered 33387, at law, the complainant for the first time asserted in a manner in which the defendant was called upon to resist the same any rights under said agreement founded upon any other or different construction thereof, in evidence of which the defendant refers to, among other things, his pleas aforesaid in said cause numbered 30611, at law, aforesaid, and his demurrer to the amended bill of complaint in this cause and his demurrer to the declaration in said cause numbered 33387, at law.

And now, having fully answered, the defendant prays hence to be dismissed with his costs.

BROOKE MACKALL.

HENRY E. DAVIS,
Solicitor for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the District aforesaid, personally appeared Brooke Mackall, who, being first duly sworn, deposes and says that he has heard read the foregoing answer by him subscribed and knows the contents thereof, and that the facts therein stated of his own knowledge are true and those stated on his information and belief he believes to be true.

BROOKE MACKALL.

Subscribed and sworn to before me this 12th day of February, A. D. 1894.

ALEXANDER H. GALT,
[SEAL.] *Notary Public.*

21 EXHIBIT D.

Motions by Appellee.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
against
BROOKE MACKALL & Others, Defendants. } Eq. 12521.

In the Supreme Court of the United States, October Term, 1889.

LEONARD MACKALL *et al.*, Appellants,
vs.
BROOKE MACKALL, JR., *et al.*, Appellees. } No. 159.

Motions by Appellee.

And now comes Brooke Mackall, Jr., the appellee in the above-entitled cause, in proper person, and moves the court to pass this cause for the present until the appellee can employ counsel to argue the said cause for the following reasons:

1. That his counsel, W. Willoughby, Esq., on Saturday, the 7th instant, notified appellee that unless appellee would execute to said Willoughby a deed for a portion of the property in controversy by 11 o'clock a. m. on the 9th instant he, Willoughby, would withdraw from the case and retain the briefs now printed.

22 This the appellee refused to do and at once, from a copy of said brief in his possession, proceeded to have said brief reprinted, and now has the same completed and filed in the clerk's office of this honorable court. The record in said cause contains about 400 pages.

2. The refusal on the part of this appellee to execute the said deed under duress is because this appellee entered into a written agreement with said Willoughby in 1883 for fees, and which agreement this appellee is ready and willing to carry out; but said Willoughby declines to proceed in the case unless said appellee executes the deed aforesaid.

In consideration of the premises that this appellee is without counsel, he asks some reasonable time be allowed him to employ counsel to argue his case—say about one month—as it will take that time to master the case; but if it can be done sooner this appellee will do so. The case is one of much gravity and will take time to prepare for the argument. This appellee has been at much expense in having the briefs reprinted in time—from Saturday until this morning.

Appellee respectfully submits that under the circumstances this court ought to grant this motion.

B. MACKALL, Jr., *Appellee.*

23 *Replication.*

Filed February 17, 1894.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant, vs. BROOKE MACKALL, Defendant. } In Equity. No. 12521.

The complainant joins issue with defendant upon his answer herein.

A. A. BIRNEY,
Solicitor for Complainant.

Testimony for Complainant.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

WILLOUGHBY vs. BROOKE MACKALL } Equity. No. 12521.

DISTRICT OF COLUMBIA, *To wit:*

Be it remembered that at an examination of witnesses begun and held on the 27th day of February, A. D. 1894, and continued from time to time until the 7th day of March, A. D. 1894, when the within deposition was taken, I, Mason N. Richardson, an
24 examiner in chancery, did cause to be personally present Westel Willoughby, to testify for and on behalf of the complainant, with due and sufficient notice to counsel for respondent.

MASON N. RICHARDSON,
Examiner in Chancery.

WASHINGTON, D. C., *February 27th*, 1894—2:30 p. m.

Met, pursuant to agreement and notice to counsel, at the law offices of W. Willoughby, Esq., to take testimony for and on behalf of the complainant.

Present: A. A. Birney, Esq., for the complainant; H. E. Davis, Esq., for the respondent; the examiner, Mason N. Richardson; the parties, and the witness.

And thereupon W. WILLOUGHBY, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of himself as complainant, testified as follows:

By Mr. BIRNEY:

Q. You are the complainant in this cause?

A. I am.

Q. Will you please produce the original of the covenant between you and the defendant, Brooke Mackall, Jr., which is the subject of this litigation?

The witness thereupon produces the paper called for by
25 counsel.

WITNESS: This is the agreement signed by Mr. Mackall and myself.

Q. Judge Willoughby, will you please state how long you had been counsel for the defendant, Brooke Mackall, at the time of the execution of that agreement, and in what causes, if you had been counsel during that time?

A. I was employed by him as counsel first in July, 1877, in equity cause No. 2373. I was also counsel for him in equity cause No. 8038 and in equity cause No. 8118, the causes that are mentioned in this agreement.

Q. At the time of your first employment by Mr. Mackall, what was the condition of equity cause No. 2373?

Mr. DAVIS: I object to the question, as the record is the best evidence of the fact inquired for.

A. That was originally a creditors' bill, filed by Alfred Richards and others against Brooke Mackall. It had then been through all the courts and through the Supreme Court of the United States. It had come back to the court upon the mandate from the Supreme Court of the United States, and a decree had been made directing the sale of all the property in lot seven, square No. 223, except the part which had been before sold by the marshal to Mr. L. Richards, and sale had been made, Mr. Shellabarger being the purchaser. I was then employed to resist the confirmation of that sale.

Q. Now state what services you performed in that cause from the time of your employment down to the time of the execution
26 of this agreement.

Mr. DAVIS: I object to the question so far as the same calls for matters resting in record.

A. The first steps I took was to resist the conformation of that sale. I remember appearing before the court and set forth the grounds upon which the sale should not be confirmed and argued it before the court, and *and* order was made denying the confirmation of the sale and directing that no sale should be made until the proper boundaries were ascertained of the property which had previously been sold to Mr. Richards. The complainants in that case after that asked for instructions from the court.

Q. Complainants or trustees?

A. The trustees. The trustees asked for instructions. The court refused to give instructions. They took that to the general term and there that refusal was confirmed. Afterwards an order was made referring the case to a special auditor, J. J. Johnson, to take testimony in regard to the boundaries and for the purpose of determining the line. A good deal of testimony was taken before the auditor. He finally made his report that he could not determine the boundaries. We came before the special term upon exceptions to his report by complainants, and the special term made an order determining the boundaries, determining that the proper southern line of the property sold by Richards was a line commencing forty-four feet south of the northeast corner of the lot and running thence parallel to New York avenue to the western boundary of the lot and directing the remainder of it to be sold. The contention
27 of Mr. Mackall was that the proper southern boundary was one running directly west from the point forty-four feet south of the northeast corner of the lot, intersecting with New York avenue about the middle of the lot, making a difference between them of about six thousand feet of ground. That was the contention all through. I took an appeal from that to the general term. The general term made an order directing the property to be sold according to the decree which had been made in special term, but saying in its decree that it was not to be construed as determining the title to the property north of that line. I then took an appeal from that to the Supreme Court of the United States. A motion was made to dismiss that appeal by the complainants. That was argued. The Supreme Court refused to dismiss the appeal. The cause finally came on for argument in November, 1884, and upon that the Supreme Court of the United States reversed the decrees of the court below and determined the proper line, determining that the property which Mr. Richards had bought was that only which was occupied by the building known as the "Palace Market building." That decree was made, I think, in November 24, 1884.

Mr. DAVIS: I object to this answer and also to the preceding answer, as the matters therein stated appear from the answers themselves and each of them to be of record, and I call for the production of the record as the best and therefore the only competent testimony.

Q. Under what kind of instrument did Mr. Richards claim to have title?

28 Mr. DAVIS: I object to the question as calling for verbal testimony as to a written instrument.

A. Mr. Richards claimed to have purchased all the property fronting on New York avenue and north of the line that I have mentioned as running parallel to the line of New York avenue.

Mr. DAVIS: I object to that as not responsive to the question.

WITNESS (continuing): By virtue of a sale made by the marshal of the District of Columbia and under a proceedings under a mechanic's lien.

Q. And what was your contention as to the question of his ownership?

Mr. DAVIS: I object to the question as calling for matter of record.

A. Our contention was that in any event he had not purchased any property south of the line running from a point forty-four feet south of the northeast corner of the lot directly west, to New York avenue.

Q. Who was in possession of the strip forty-four feet wide running from the east line of the lot to the west, as you have described?

Mr. DAVIS: Objected to as irrelevant and immaterial.

A. Mr. Richards was in possession of all that part that he claimed.

Q. What was the result or effect of the final decree in the proceedings which you have mentioned, number 2373, as far as the change of possession is concerned?

Mr. DAVIS: Objected to as immaterial.

29 A. Mr. Richards gave up his claim to the part which was adjudged not to belong to him or to have been purchased by him, and Mr. Mackall obtained possession, and, as I understand, has since remained in possession of it.

Mr. BURNEY: I here offer in evidence the record of the pleadings and the evidence, petitions, and other papers making up the record in cause No. 2373 mentioned by the witness.

Q. When were you first employed in cause 8038 and what was the nature of that cause and what was the status of that cause at the time of making this agreement?

Mr. DAVIS: I object to the question, as the record is the best evidence of the matter inquired of.

A. A bill in that case was filed February 14, 1882. It was a bill brought by the brothers and sisters of Brooke Mackall to set aside a deed which had been made by his father to him a few days before his death, charging that it had been obtained by undue influence and fraud. I had been taking depositions in that case, and up to the time this agreement was made I think we had been engaged in

forty-eight different days in taking depositions. They were all taken in long-hand.

Q. You were defending that cause?

A. I was defending that cause in behalf of Brooke Mackall. I think that it was about the time that the depositions had been taken in behalf of the complainant in that case. After that depositions were completed, altogether occupying, if I have counted right, sixty-seven days. The case came on for argument in December, 1883, and we were engaged in the argument, according to memorandum which I believe to be correct, nine days before Justice James, and on the tenth day he sent it to the general term to be heard in the first instance. That case involved the title to all the property except that occupied by the Palace Market building, and I believe was claiming that at the time. This property consisted of about fifteen thousand feet of ground, and was worth about two hundred thousand dollars.

Mr. BIRNEY: Counsel for complainant here offers in evidence the record of the cause No. 8038 for the purpose of showing the extent of the services rendered in said cause prior to the certification of said cause to the court in general term.

Mr. DAVIS: I object to the offer as of matter that is irrelevant, immaterial, and inadmissible under the pleadings.

WITNESS: I will say that this was a litigation that was carried on with the greatest bitterness on both sides. Mr. Mackall was extremely anxious not only on account of the value of the property involved, but on account of the charges which were made against his character, and he was in my office almost constantly in reference to it, having the key to my office, and talking to me about it very frequently.

Q. Please state what was the nature of cause No. 8118 and what services you performed in that cause up to the time of an appeal to the court in general term.

Mr. DAVIS: Objected to as calling for matter of record, in the first place.

A. In the first place, I brought a suit in ejectment at the instance of Leonard Mackall, trustee for his father, to recover property which had been purchased by Mr. Richards and which he claimed. It was delayed quite a good while, and in the meantime the father died before the case came to trial or came before a court and jury. It did come before a court and jury finally, and it was there held by the judge that under the terms of the trust to the father, the father having died, the suit could not be sustained in the name of Leonard Mackall, trustee. I took that to the general term. That was pending there some time, and it was there argued and that was sustained. I then filed a bill for Brooke Mackall in his name to recover the property on which the Palace Market building stands and to recover the mesne profits, it appearing that Mr. Richards had received over twenty thousand dollars rents for that property. Depositions were taken in the case and witness produced, and

it finally came before the court on the 12th of April, 1883, and the court dismissed the bill. An appeal was then taken to the general term, which reversed the decree of the court below. That case was finally taken to the Supreme Court of the United States, which sustained the decree of the special term.

Mr. DAVIS: The answer is objected to so far as it states matters of record.

Mr. BIRNEY: Counsel for complainant now offers in evidence the record of said cause No. 8118 for the purpose of showing the extent of the labors performed by complainant from the beginning of said cause down to the time of the appeal therein taken by the said Brooke Mackall to the court in general term.

Q. Can you state approximately the value of your services rendered to the defendant in the cause 2573 up to the time of the adjudication in the Supreme Court of the United States in
32 November, 1884?

Mr. DAVIS: Objected to as irrelevant and immaterial.

Q. (Continuing:) And in the causes 8038 and 8118 until the time of the appeal in each in the supreme court of the District of Columbia, in general term.

Mr. DAVIS: Same objection.

A. The property in dispute in number 2573 consisted of about six thousand feet of ground, which was worth, I should think, at least $10.00 a foot, being upon the front of New York avenue and being the most desirable part of the ground. I would not think that ten per cent. was an unreasonable fee. I think my services were fairly worth it; in fact, cutting this property off from the rest of the property would render it comparatively valueless or it would at least injure it very much more than by taking it all *off* from any other portion. The property involved in 8038, as I have said, was worth $200,000. I think that a reasonable fee would be $3,000. I think my services were worth that.

Q. That is the services that you have mentioned?

A. Yes, sir; the services that I have mentioned specially, and he was finally successful in that. I put the value of my services in the other case at least $1,000.00.

Q. I direct your attention to the value of the services in those two causes until they reached the general term.

A. Yes, sir; I mean the services up to that time of the general term in 8038, including the taking of the depositions and the argument which I have mentioned.

33 Q. And in the cause 8118 up to that time of the decision of the special term?

A. Yes, sir.

Q. Then you would estimate the value of the services in those two causes up to the time they went to the court in general term at $1,000, as I understand your answer?

A. Yes, sir; I think my services were reasonably worth that as such services are usually measured.

Q. And for services in 2373 up to the time of the decision of the Supreme Court of the United States in November, 1884, I understand you to estimate the value of them at $6,000?

A. Yes, sir.

Q. Now, will you please state the circumstances under which your agreement or covenant, which has been offered in evidence, was made, as you recollect them?

A. Well, as nearly as I recollect, the cases were in the situation as I have described them, and I called upon Mr. Mackall to have an understanding about my fee in the matter. We had a discussion upon it, which continued some days. I do not remember how long. Different terms were talked about and I do not recollect exactly what, but it finally resulted in the execution of this agreement to April 10th, 1882. It was all conducted in an amicable spirit, and, as I recollect, it was thought that at that time—we at that time felt very confident of succeeding in the cause 8118, and we thought that that would necessarily result in our receiving the amounts of rents which Mr. Richards had collected, as he admitted, and we thought that that was the better way, if we could collect the money
34 that way, that I should be paid in that way, both for himself and myself. But I was not willing to risk the whole of my services in all these cases upon that case alone, and therefore I provided in the agreement that I was to have a compensation of $5,000 at least in any event. That was fairly understood between the parties, according to the best of my recollection. I cannot remember very accurately what took place at that time, as I have said at about that time we had completed the testimony—the testimony had been completed by the complainants in 8038—and although 8118 was dismissed on the 12 of April I went right on with the taking of depositions in cause No. 8038, with the expectation of or in any event of getting a fee of $5,000 at least.

Q. It is averred in the answer and in the cross-bill that you stated to Mr. Mackall before he executed the agreement that after you had presented it to him that the meaning was that he should pay nothing and you should receive nothing as compensation unless there should be a recovery of mesne profits in cause No. 8118. States whether there was any such statement made.

A. That averment is not true. No such statement was made by me, or anything like it.

Q. When did you first learn of the statement now made in the answer and cross-bill that you induce the signing of this agreement by Mr. Mackall through a threat to withdraw from his causes if this paper was not signed?

A. Well, I think it was some time ago—I do not remember how long ago—that Mr. Hoeling told me that Mr. Mackall was going to make the complaint, if the court ruled against him on de-
35 murrer, that I had obtained this agreement by stating to him that the meaning of it was as he claimed.

Q. How long ago was that, about—how many years?

A. Oh, it was some months ago. I cannot tell you exactly.

Q. Was that the first intimation?

A. That was the first time that I ever heard that he made such a claim.

Q. Was that the first intimation that you had that he claimed that the fee was to be a contingent fee and not an absolute fee?

A. No, sir; I think Mr. Mackall told me when we had a quarrel. I think Mr. Mackall told me that he claimed that that was the construction of the agreement, but he did not claim that I had told him anything of the sort, or that I had forced it from him in any way.

Q. About what year was that?

A. That was in 1889.

Q. For how many years after this agreement was made did you continue to act as counsel for Brooke Mackall and be upon friendly and amicable terms with him?

A. Until December, 1889.

Q. How frequently did you see him during that time?

A. Well, he had the key of my office and seemed to make this a sort of headquarters all that time; daily and at intervals he would come in. I saw him a great many times—hundreds of times.

Q. In June, 1890, you brought an action at law, No. 30611, against the defendant, Brooke Mackall, for services rendered by you as attorney in a number of causes. Will you please state whether the services which you have mentioned here, being those
36 rendered by you in equity cause No. 2373 up to and including the decision of the Supreme Court of the United States rendered upon the points which were pending at the time of the making of this agreement, and your services in 8038 up to the time of the appeal to the court in general term, for services in 8118 up to the time of the appeal to the court in general term, were involved or litigated in the suit numbered 30611.

Mr. DAVIS: I object to the question on the ground that the record in the cause No. 30611 referred to is the best evidence of the matters litigated therein and because the question calls for evidence irrelevant and immaterial.

A. These services mentioned in the question were not involved in cause at law No. 30611. I expressly disclaimed in my testimony any claim for any of these services, and they were expressly excluded by the charge of the court to the jury. I had a stenographic report of the charge, but on inquiry of Mr. Richardson, who took it, I ascertain that they had been mislaid and could not be found.

Mr. BIRNEY: The complainant here offers in evidence the record of 30611, at law.

Q. The bill of particulars in that cause shows certain considerable sums claimed by you on account of services rendered in these three suits, 2373, 8038, and 8118, all in equity. Please state what services those were in a general way for which you claimed compensation in those causes, fixing the time at which such service for which you claimed that compensation commenced.

37 Mr. DAVIS: Objected to on the grounds that the question calls for testimony irrelevant and immaterial and incompetent; secondly, that the judgment in said cause makes the matter of the question of compensation in the causes mentioned between the plaintiff and the defendant herein *res adjudicata*, and, third, that the complainant having after the rendition of all services rendered by him in the three causes mentioned brought a general suit at law against the defendant for compensation in those causes and having recovered judgment, he is now estopped to claim further compensation in the premises.

A. The services claimed by me on the trial of that cause in these three cases were services in No. 2373 after the decision of the Supreme Court of the United States in November 24, 1884, and in 8038, services after it had been sent to the general term by the special term, and in 8118 for services after *after* the decree in special term. Several witnesses were examined as to the value of those services, and in each case distinction was carefully made between those services and the services which I am claiming in this suit. In each case each witness was allowed only to testify as to the value of services after the time I have mentioned.

Mr. Birney hereupon announced the direct examination of this witness as closed.

38 WITNESS: I wish to make a correction in my testimony. I stated that the amount of ground involved in cause No. 2373 was about six thousand feet. I think I made an error in this. I failed to deduct the amount of ground covered by the building. I made my statement from looking at a statement of the defendant's in his testimony where he had stated that the amount of ground which Mr. Richards had possession of was very nearly six thousand feet, but I made this error in not deducting the ground covered by the building.

Cross-examination.

By Mr. DAVIS:

Q. Who prepared the original agreement of April 10th, 1883, which has been offered in evidence by your counsel?

A. I do not recollect who prepared it; but I presume that I did. The handwriting of the original agreement is not mine. I think it is in the handwriting of a Miss Pike. I am not certain about that—let me see. (Witness examines the agreement.) Really I do not know whether it is in her handwriting or not.

Mr. DAVIS: It is in her handwriting. Was this agreement executed in duplicate?

A. I believe it was.

Q. Do you know where the other duplicate copy is?

A. I do not.

Q. Do you remember, Judge, that you prepared this agreement and gave it to Mr. Mackall and Mr. Mackall had it copied by Miss Pike, and that it was afterwards executed as copied?

A. I believe that to be so. I do not recollect distinctly.

Q. You have stated in your testimony the condition of equity cause No. 2373 at the time of your first employment by Mr. Mackall, and you say that the bill in that cause was an original creditors' bill filed by Alfred Richards and others against Brooke Mackall. That is correct, I believe?

A. It is.

Q. Do you remember who the other parties complainant to that cause were?

A. Alfred Richards and Thomas A. Richards, Thomas Wilson, J. D. Parkinson, F. Wheatley, D. Hannan, Washington Gas Light Company, H. P. Pepper, and P. O'Hare.

Q. They were all original creditors of Brooke Mackall, Jr., were they not?

A. They claimed to be, and I believe that they were.

Q. And the object of that bill was to subject to the satisfaction of those judgments the part of lot 7, square 223, remaining after deducting or carving from the said lot the portion which had been previously sold by the marshal of the District of Columbia, and Alfred Richards being the purchaser?

Q. Yes, sir.

Q. And the sale to Alfred Richards was made in 1870?

A. Yes, sir.

Q. The portion sold to Richards was occupied, either wholly or in part, by the building known as the Palace Market building?

A. It was.

Q. And prior to the commencement of that suit No. 2373 the marshal had made a deed to Mr. Richards, had he not?

A. I believe so.

Q. Do you not know so, Judge?

A. These are matters of record which I would like to be sure about.

Q. Look at page 2 of the Supreme Court Record.

Record is hereupon examined by the witness.

A. Yes, sir; I believe so—I understand so.

Q. Now, prior to the commencement of the cause number 2373 was any attempt made to rectify the supposed error in the description contained in the marshal's deed, so far as you know?

A. Not that I can now call to mind.

Q. So that the situation was this: In 1870 Mr. Richards purchased at marshal's sale a part of that lot including the portion which the Palace Market building stands on, and this cause No. 2373 was instituted in May of the following year?

A. Yes, sir; I understand it so.

Q. Now, in the original bill in 2373 no questions appear to have been made as to the proper boundaries of the portion previously sold to Richards. That is correct, is it not?

A. Yes, sir.

Q. How, then, did the question as to the proper description get into cause No. 2373?

A. It got in first by an order made by Justice Wylie, setting aside the sale which had been made, or, rather, refusing to confirm a sale which had been made and directing that no sale be made until the proper boundaries were determined, as his order will show, made in July, 1877.

Q. Was not this the way of it: The bill in 2373, being a judgment creditors' bill, was filed for the purpose of subjecting to certain judgments against Mr. Mackall all of lot 7, in square 555, which had not previously been sold by the marshal to Mr. Richards. This bill was successful, the Supreme Court of the United States finally determining that the property sought to be sold by the bill should be sold to pay the judgment. On the return of the cause to the
41 supreme court of the District of Columbia the trustees appointed by the court to make a sale purported to make a sale, and in so doing they made a statement about the boundaries of the property sold which, in the opinion of the court, justified the setting aside of their sale, and then before directing another sale or as part of the direction for another sale the court referred the question to the auditor to determine what were the proper boundaries of the portion previously sold to Richards. That is right, is it not?

A. Not exactly. I understand that the trustees did make a report that the boundaries were not——

Q. You mean a statement?

A. Yes, sir; a statement that there was uncertainty about the boundaries, and it was for that reason the order was made. The reference to the auditor was made afterwards—it was not made until nearly a year after that, but it was then made—to take testimony in regard to it and to make a report.

Q. But the point is, is it not, that owing to the peculiarity of the description in the marshal's deed there was on the face of that deed an ambiguity as to the particular ground sold?

A. Yes, sir; that is it.

Q. No question was made, however, about that in the proceeding in which the sale was made?

A. No, sir.

Q. And then when it came to selling the remainder of the lot, not sold to Richards, the question as to the correct boundaries as described in the marshal's deed arose and had to be determined?

A. That is so.

Q. And the reason for that was that it was necessary to do
42 so in order to ascertain how much and according to what boundaries the remaining land should be sold to satisfy the judgments set up in the original bill in 2373?

A. I understand that to be so.

Q. Now, was any sale made under the bill in 2373 after the first attempted sale by the trustees?

A. There was not.

Q. The case again, however, went to the Supreme Court of the United States, and in the course of its opinion the court indicated

its views of the correctness of the boundaries according to the marshal's deed, and the view of the Supreme Court was acquiesed in?

A. That is so.

Q. Thereafter Mr. Mackall paid the judgment without submitted to a sale under the bill in 2973?

A. Yes, sir.

Q. I wish you would look at the paper I now show you and state what that is.

A. My brief on motion to dismiss appeal in the Supreme Court of the United States.

Q. That is in cause——

A. No. 2973.

Q. You prepared that brief, did you not, Judge?

A. I did.

The same is hereupon marked for identification A. Mason N. Richardson, examiner.

Q. The object of the suit No. 8118, as I understand, was to recover possession of a part of this lot number 7 that had been
43 sold to Richards by the marshal in 1870, and also to recover damages for the mesne profits during the time that Richards has been in possession of it. That is correct, is it not?

A. I believe so; the bill will show.

Q. And the ground of the suit was the invalidity of the marshal's sale and deed because of this difficulty about the description?

A. Yes, sir; and other grounds.

Q. And other grounds, including the invalidity of the judgment and some of the other proceedings? Is that correct?

A. Well, it included that, and because it was the sale of an equitable interest in a proceeding at law. I do not remember all the grounds.

Q. If that suit had been successful the result would have been that Mr. Mackall would have recovered possession of that portion of lot 7 which the Palace Market building stands upon?

A. Yes, sir.

Q. And also damages for its occupation by Mr. Richards during the time that he had it?

A. That is what he claimed, and I think that would have been the result.

Q. You say in your testimony that the parties acquiesed in the view of the Supreme Court as to the proper boundaries under the marshal's deed of 1870, and that Mr. Richards gave up his claim to the part indicated by the Supreme Court as not being within the terms of the deed, and that Mr. Mackall obtained possession thereof?

A. Yes, sir.

44 Q. Was Mr. Richards in actual possession of that part at the time or did he only abandon his claim to it?

A. I understood that he was in possession from 1870 until after the decision of the Supreme Court of the United States.

Q. Have you any personal knowledge as to that, Judge?

A. Well, that was an understood fact between us all the while. I regarded it as a conceded fact.

Q. You yourself were not on the ground to ascertain whether that was so, were you?

A. That was the statement of both Mr. Richards and of Mr. Mackall.

Q. What? That Mr. Richards had been in actual possession—physical possession—of that part of the lot?

A. That is his statement.

Q. Whose statement?

A. Mr. Mackall's. He made that statement under oath in the cross-bill filed in No. 2373 after the decision of the Supreme Court of the United States.

Q. You said on your direct examination that Mr. Mackall was in consultation almost constantly with reference to the cause No. 8038, and that he had a key to your office. Where was your office then?

A. In was in 456 La. Ave.—building 456 La. Ave.

Q. How did he come to get that key?

A. I do not remember.

Q. You must have given it to him.

A. Very likely.

Q. Now is this the way of it, Judge? Was not Mr. Mackall the means of bringing a number of clients to you?

A. He brought some clients to me.

Q. And was he not in a general way familiar with the business of those clients?

A. He was.

Q. And that business was the subject of frequent conversation between you and him, was it not?

A. It was some; yes, sir; to some extent.

Q. And at that time you had no associate in business?

A. I had not.

Q. And did you not give him the key to your office in order that when you were not there he might have admission to it and see those different clients when they called?

A. No, sir; that was not the purpose of giving him the key.

Q. What was the purpose? If Mr. Mackall was to call at your office to talk to you about his business, of course the hypothesis necessarily involves your presence in the office.

A. Yes, sir.

Q. And that in turn necessarily involves the hypothesis of your being in the office and the office being open so that he might be admitted?

A. Yes, sir.

Q. You did not, then, give him the key that he might meet you in your office to talk about his business?

A. I have no recollection of the particular purpose for which I gave him the key. I do not remember anything about it. I know that he had the key and that he made it a sort of headquarters in

my office. He had no other office for much of the time—
46 the most of the time.

Q. That was not against your consent, was it?

A. No, sir.

Q. There were no services of a professional character that Mr. Mackall could render himself in his business were there?

A. Not as I understand it—services of a professional character. Of course, he could render me service in his business or render himself of service.

Q. Of course, but he could not——

A. To some extent as a client, naturally.

Q. Mr. Mackall's actions in that behalf were numerous, were they not? I mean by that that he was very active in forwarding his own interest and helping, so far as a client could help, in the preparation and forwarding of his causes.

A. Yes, sir; he was very active and quite intelligent in the matter. I discussed very freely all questions of law and of fact with him and he seemed to appreciate them very well.

Q. And Mr. Mackall was in frequent conversation with these people that he brought in to you as clients, was he not? I mean in your office and to your knowledge.

A. Why, I do not remember that he was very frequently in conversation with them. He was there when they came there frequently. I did not depend upon him to any extent for assistance in those cases.

Q. You have stated in your direct examination that this cause 8418 finally came before the court on the 12th of April, 1883, and the court dismissed the bill, meaning thereby the court in special term, I suppose.

47 A. Yes, sir.

Q. Do you remember when that case was on the call for hearing first?

A. I do not.

Q. And how many days were occupied in its hearing in the special term?

A. I do not remember; I think it was one day; it might have been two or three.

Q. Was the decree made the same day the cause was submitted?

A. Yes, sir—no; I think, on the whole, that it was all disposed of in one day. I am not certain about that.

Q. It was a voluminous record, was it not?

A. Rather so; yes, sir.

Q. And the testimony of record was to be read and the law argued?

A. Well, I do not remember; yes, sir; I presume so, but I cannot remember the time that was occupied in arguing it.

Q. And the decree, you say, was signed on the same day on which the argument was concluded?

A. Yes, sir.

Q. There were a number of depositions in the case, as you have said?

A. Yes, sir; I believe so.

Q. Who was your adversary?

A. Mr. Webb.

Q. Was there very much of an argument in the case?

A. Yes, sir; there was quite an argument.

Q. After the reading of the record?

48 A. Oh, I think so. I cannot remember very much about it.

Q. What I want to get at is your best recollection as to the length of time that that hearing occupied. Now, I sup- that, as usual, especially at that time, the record was read, you addressed the court, were followed by counsel on the other side, and you in turn followed him and closed and submitted the case?

A. I presume so, but I state it more upon presumption than actual recollection.

Q. Did you have any difficulty in getting Mr. Mackall to sign this agreement which is the subject of suit in this case?

A. I do not remember that there was any special difficulty. The matter was discussed pretty well.

Q. Did he make any objection to it as it was prepared by you and handed to him by you?

A. I do not remember that he made any objection after it was prepared. I think he did not agree at first until we came to an agreement.

Q. You talked it out?

A. We talked it out and then it was prepared.

Q. Put the result of your talk in form. Is that right?

A. I think so.

Q. You say in your direct examination, after referring to the situation in which the cases were, that you called upon Mr. Mackall to have an understanding about your fee, and that this agreement followed. That is the correct order, is it?

A. I think so.

Q. Prior to that time had you had any conversation with

49 him about your fee or any attempt at an understanding?

A. Not for a long time.

Q. Had you had any agreement?

A. Well, I think it was some years before that that there was an agreement in reference to matters as they then stood.

Q. Did Mr. Mackall sign this agreement without asking any explanation of it and without receiving any?

A. I have no recollection that he made any inquiry as to the explanation of it. I think if he had I would have remembered it.

Q. Was anything said by him by way of inquiry as to the meaning of this conditional feature of the agreement?

A. There was not.

Q. And nothing said by you on that subject?

A. I do not think there was. I am quite certain there was not.

Q. Now, at the time that this agreement was made the condition of equity No. 2373 was that it was pending on the appeal in the Supreme Court of the United States for what purposes?

A. We had appealed to the Supreme Court of the United States

from a decree of the general term which directed all the property south of the line running parallel to New York avenue to be sold, the decree in special term having before that adjudged that that was the line of the boundary of the property sold by the marshal to Mr. Richards.

Q. Was not this the language of the decree appealed from, so far as respects that matter: And it is further ordered that so much of the decree of the court in special term as orders that a sale be made of the property mentioned in the proceedings be, and the
50 same is hereby, affirmed, and that the said trustees, William B. Webb and Westel Willoughby, shall proceed at once to sell, under the terms and conditions and for the purposes set forth and contained in the decree passed in this cause on the first day of May, 1873, and affirmed by the Supreme Court of the United States on appeal, all that part of lot numbered 7, in square 223, in the city of Washington, in the District of Columbia, lying south of a line drawn from a point on 14th street 14 feet south of the northeast corner of said lot and running thence parallel to the line of New York avenue to the west line of the said lot; this decree to be construed as not determining any question of title to any portion of said lot 7 lying north of said line?

A. As I recollect it, that is the substance of the decree. The record will show.

Q. Well, look at the printed copy of the record which I now show you and tell me if those are not the exact words, beginning there with the semicolon.

A. They seem to be the words.

Q. Then the decree appealed from and upon which appeal cause 2373 was pending in the Supreme Court of the United States at the time of the making of this agreement expressly reserved the question of title as to the portion of the lot claimed to have been sold by the marshal in 1870, did it not?

A. Yes, sir.

Q. In answer to a question by your counsel as to the time when you first learned of the statement now in the answer made and cross-bill, that you induced the signing of the agreement sued on by Mr. Mackall through a threat to withdraw from his causes if it was not signed, you answer that you thought it was some time
51 ago, that you did not remember how long ago, that Mr. Hochling told you that Mr. Mackall was going to make complaint if the court ruled against him on demurrer. Can you fix the time more nearly than that?

A. Only by guessing—guess-work. It might have been a year ago. I could not say whether it was more or less. It was certainly a considerable period after the amended bill was filed in this case.

Q. Do you remember where it was that Mr. Hochling made that statement?

A. Where?

Q. Yes, sir.

A. We were at the city hall—the steps of the city hall.

Q. Well, you say also that that was not the first intimation that you had that Mr. Mackall claimed that the fee was but a contingent fee and not an absolute one, and that you thought Mr. Mackall told you, when you had a quarrel with him, that he claimed that that was the construction of the agreement. By the quarrel here mentioned do you mean the difficulty that you and he had in 1889 when cause 8038 was about to be argued in the Supreme Court of the United States?

A. Yes, sir.

Q. Where was it that Mr. Mackall made that statement to you?

A. In the back room of my present office.

Q. When you presented to Mr. Mackall in 1889, at the time I have mentioned, the question of signing a new agreement, he claimed, did he not, that you should go on under the agreement that is in suit in this cause and also put upon that agreement the construction which he now puts on it, namely, that the fee was to be contingent?

52 A. He said that he would pay me $500 in case we succeeded in that case 8038, and that he did not consider himself bound to pay any more.

Q. But did he not also distinctly say that under that agreement your fee was to be contingent, and that he regarded the payment of the $500 as in addition to what under the agreement you were really entitled to?

A. He did not say it in those words.

Q. That was the substance of what he said, was it not?

A. It may be.

Q. You say also that Mr. Mackall at that time did not claim that you had told him that that was the construction of the agreement?

A. No, sir; he did not intimate it then.

Q. When at any time until the setting of it up in the answer and cross-bill in this case. Is that correct? I mean now——

A. I heard that he was going to set up this claim, but I cannot recollect who told me so, whether it was you who told me so or not.

Q. I never told you. No; I do not mean that. What I mean is this: Whether before the filing of the answer to the cross-bill in this case Mr. Mackall ever said to you, or any one ever said to you as coming from him, that he had told you at the time the agreement was made that that was its meaning.

A. I do not remember anything except what Mr. Hoehling told me.

Q. Well, what Mr. Hoehling told you was that Mr. Mackall was going to set up the contension that that was the meaning of the agreement. What I wish to know is whether anybody told you that Mr. Mackall or whether Mr. Mackall himself told you

53 at any time before filing his answer and cross-bill that he would claim that you had told him that that was the meaning.

A. Well, I have had such information, but I cannot exactly tell just at this moment where I got it; Mr. Mackall never told me so.

Q. Did you ever tell anybody that that was the meaning of the agreement?

Mr. BIRNEY: That is objected to as not setting time, place, nor person when it may be claimed that the witness made such a remark.

A. I have no recollection of making any such statement.

Q. You know Thomas E. Young, do you not?

A. I do.

Q. How long have you known him?

A. Well, I suppose I have known him twenty years.

Q. Mr. Young was for some time a client of yours, was he not?

A. He was.

Q. For how long a time?

A. Oh, I should think eight or ten years.

Q. During the time that you were acting for Mr. Mackall in the cause about which we are inquiring?

A. Yes, sir.

Q. He was one of the clients Mr. Mackall brought you, was he not?

A. Yes, sir.

Q. Did you tell Mr. Thomas E. Young that the meaning of the agreement that you had with Mr. Mackall—I mean by that
54 the agreement in suit here was that your fee was contingent upon success in cause 8118?

A. I could not have told him any such thing.

Q. Apart from your ability to do it, did you do it—did you tell him so?

A. I should say not; if he has ever understood anything of that sort he certainly must have misunderstood me. I have no recollection of ever having said anything to him on the subject.

Q. You remember, of course, with perfect distinctness the difference you had with Mr. Mackall in 1889 at the time the cause No. 8038 was about to be called in the Supreme Court of the United States?

A. I do.

Q. Was not that difficulty the subject of conversation between yourself and Mr. Young at the time it happened?

A. I presumed it was talked of; it was; yes, sir.

Q. Do you not recollect that you stated to Mr. Young while in conversation with him on that subject that you had requested Mr. Mackall to sign the paper that you had prepared for his signature, and that he had declined doing it?

A. I do not remember what the conversation was exactly. I do remember talking with him about the difficulty, and it may be that I said that.

Q. Mr. Young did know, did he not, that you had presented that paper to Mr. Mackall and he had refused to sign it?

A. I cannot recollect whether he knew it or not. He knew of the difficulty between us, but just what he knew I do not know. I

do not know that I had any occasion for telling him of what
55 difficulty or of the circumstances of it.

Q. Did not Mr. Young advise you against having any difficulty with Mr. Mackall in the matter, and did he not advise you to adhere to the agreement which is in suit here?

Mr. BIRNEY: Objected to as immaterial and incompetent.

A. No, sir; I have no recollection of anything of the sort, and I am sure I would remember it if it were so. I did not seek Mr. Young's advise as to such matters. I do not think that he offered it to me.

Q. Did not this occur in substance: That Mr. Young talked with you about the matter and you talked with him and you claimed that you should have a better provision for your compensation from Mr. Mackall and Mr. Young suggested to you the advisability of adhering to the old agreement, whether it was as favorable as you would like it or not?

A. There was nothing of the kind. I did not talk freely with Mr. Young. He knew that there was a difficulty. I think he told me that Mr. Mackall was having my briefs reprinted. There was very little said. I do not think I went into particulars with him at all. Mr. Young is a man whose advise on such a subject as that I would not seek, nor do I think he would offer it.

Q. And in fact you did not say to Mr. Young, either literally or in substance, that the agreement here in suit was for a contingent fee?

A. I did not.

Q. When you wrote Mr. Mackall the letter on the 6th of December, 1889, the cause number 8038 was about to be called for
56 hearing in the Supreme Court of the United States, was it not?

A. It was on the assignment for hearing.

Q. And your briefs were read and printed, ready to be filed?

A. They were.

Q. And you told Mr. Mackall that you would not file them unless he signed the paper that you had prepared and presented to him?

A. I wrote him that letter.

Q. Now, there is filed with Mr. Mackall's original answer to the original bill in this cause a copy of the paper which he says you then presented to him to be signed. Have you compared that or examined that paper so as to be able to say whether it is a true copy?

A. No, sir; I do not know that I have.

Q. Have you a copy of it?

A. I have a copy, I presume.

Q. Could you produce it without great inconvenience?

A. I do not know whether I can or not.

Witness examines among his papers.

Mr. DAVIS: I will pass from this, with the request that if you succeed in finding a copy you will produce it hereafter.

A. Very well.

Q. Now, in your letter to Mr. Mackall you speak of a brief in reply, which you say you consider indispensable. Was that brief in reply prepared at the time or was it prepared afterwards?

Mr. BIRNEY: Objected to on the ground that it is utterly immaterial to the issues in this case.

A. I prepared a brief afterwards at the request of Mr. Wilson, who was in the case and it was understood would assist me
57 in the argument of the case when it was reached. That had been the understanding for some months before the case was reached.

Q. You mean to say that Judge Wilson was employed by Mr. Mackall before the difficulty between you and him?

A. It was understood that he was to assist me in the argument of the case. What he had actually done in the way of employment I cannot say. I think I talked with him about it before that time.

Q. Well, after the difficulty between you and Mr. Mackall at that time Mr. Mackall employed Senator Blackburn and Judge Wilson, did he not, as counsel, and they participated in the hearing in the Supreme Court of the United States?

Mr. BIRNEY: Objected to as immaterial.

A. He employed Mr. Blackburn afterwards and had employed, as I recollect, Mr. Wilson before that time, and Mr. Blackburn and Mr. Wilson did act as counsel, and I counselled with them at their request.

Q. How long after the difficulty between you and Mr. Mackall was it that you counselled with them?

A. A very few days.

Q. Was it at Mr. Mackall's request?

A. No, sir.

Q. Or with his consent?

A. No, sir.

Q. So far as you know, was it with his knowledge at the time?

Mr. BIRNEY: Objected to.

A. Mr. Wilson told me that he talked with Mr. Mackall
58 about it and understood that I should and insisted that I should assist him in the argument of the case, but that Mr. Mackall objected. At one time it was agreed between Mr. Wilson and myself that we, Mr. Blackburn and I, should argue the case. He, however, said that Mr. Mackall so strongly protested against my having anything to do with the argument he would have to give it up, and it was then insisted that Mr. Wilson and Mr. Blackburn should argue the case and I should be present and help them and I should act in consultation, which I did. I met them at Judge Wilson's office and went over the whole case with them both.

Q. You said something a moment ago about Mr. Mackall's hav-

ing had your brief printed. How did that happen? Do you know? You were in possession of the briefs?

Mr. BIRNEY: Objected to.

A. Well, in some way he had gotten possession of one copy of my brief. How, I do not know, and he had gotten it printed between Saturday and Monday.

Q. As a rule in Mr. Mackall's matters, Judge, who attended to the printing of the briefs?

A. I do not remember.

Q. Do you not know that Mr. Mackall himself attended to the printing and gave the orders to the printer and took your manuscript down and carried the proof to your office?

A. I do not remember how that was.

Q. How did you get in possession of these briefs yourself? You sent to the office for them directly, did you not?

A. I do not remember whether I did or ordered the printer
59 to send them to me. I am quite sure that I saw the printer about it while it was being printed.

Q. Did you do that in any other of Mr. Mackall's case? In other words, was not that exceptional?

Mr. BIRNEY: Objected to.

A. I do not remember what I did in each particular case of his. He paid for the printing and I generally attended to it.

Q. At the close of the last session I asked you if you could furnish copies of your briefs in cause 2373, and I understood you to say that you would look for them. Have you succeeded in finding any?

A. Well, I did not find any except that brief or motion to dismiss the appeal.

Q. The copy of which I showed you for identification awhile ago?

A. Yes, sir.

Q. I understood you also at the close of the last session, although it does not appear in the record, that you would probably not be able to find many of the briefs because Mr. Mackall had taken away a lot of papers out of your office and you do not know whether the briefs were among those papers or not. When did Mr. Mackall take any papers from your office?

A. I think about some time in December, 1889.

Q. After your difficulty?

A. No, sir; before.

Q. What was the occasion of his taking them away?

A. Well, I had for two or three months been talking with him about making some arrangement for a fee and for further
60 compensation. He had put it off from time to time. He came into my office one day, however, and said, "Now, Judge, I have got a place where I can put all my papers and I will not trouble you to store them any longer." He brought a colored man here with him and went all around the office and took all the papers

that he could find that belonged to him and took them away. I said the other day that I was not able to find the briefs, but I would not say that he took them away; but I have not been able to find them since.

Q. Judge, do you not remember that about the time or shortly before the time of which you have been speaking Mr. Mackall was indisposed and went out to Takoma Park and sent you some packages of paper by his man servant for safe-keeping until he returned, and those were the papers that he took away?

A. Those were some of the papers, but there were other papers in connection with his case. He examined all over the office where there were paper- connected with his cases, and took papers and said that they belonged to him, and that he wanted to take them away. He had been ill at Takoma Park, and had sent me papers that I had charge of.

Q. Whatever taking away of papers there was was in your presence, was it not?

A. Yes, sir. I did not examine to see what papers he took. I supposed that he would not take anything but what belonged to him, and I do not say that he did now.

Mr. DAVIS: I think that is all, except that I reserve the question of identification — the paper submitted to Mr. Mackall in 1889, about which I have already spoken.

WESTEL WILLOUGHBY.

61 Mr. BIRNEY: I have no redirect examination.

Mr. BIRNEY: I here announce my case-in-chief as closed.

MASON N. RICHARDSON,
Examiner in Chancery.

Testimony for Complainants in Rebuttal.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

WILLOUGHBY } Equity. No. 12521.
vs.
MACKALL. }

DISTRICT OF COLUMBIA:

Be it remembered that at an examination of witnesses begun on the 26th day of March, 1894, and continued from time to time until the 30th day of March, 1894, when the within depositions were taken, I, Mason N. Richardson, an examiner in chancery, did cause to be personally present R. S. Davis, Dorsey Clagett, Brainerd H. Warner, John W. Douglass, William B. Webb, and Albert Gleason and W. Willoughby to testify for and on behalf of the complainant in rebuttal, with due and sufficient notice to counsel for respondent.

MASON N. RICHARDSON,
Examiner in Chancery.

62 In the Supreme Court of the District of Columbia.

WILLOUGHBY }
vs. } Equity. 12521.
MACKALL. }

I, Mason N. Richardson, an examiner in chancery, at the request of counsel for complainant, do hereby fix and appoint Monday, March 26th, 1894, at the hour of three o'clock p. m., as the time and the office of Westel Willoughby, "Walker building," in the city of Washington, District of Columbia, as the place for taking testimony for and on behalf of the complainant in rebuttal in the above-entitled cause.

MASON N. RICHARDSON,
Examiner in Chancery.

To counsel for defendant:

Please take notice that, in accordance with the above notice, I shall, at the time and place therein named, proceed with the taking of evidence for and on behalf of the complainant in rebuttal.

WESTEL WILLOUGHBY,
Attorney for Complainant.

Service acknowledged this 24th day of March, 1894.

HENRY E. DAVIS,
Solicitor for Defendant.

8 witnesses summoned.
10. M. N. R.
2.
4.

63 WASHINGTON, D. C., *March 26th*, '94—3 o'clock p. m.

Met, pursuant to notice to counsel, herewith attached, at the law offices of Westel Willoughby, Esq., "Walker building," to take testimony for and on behalf of the complainant in rebuttal.

Present: The complainant, P. P.; H. E. Davis, Esq., for the respondent; M. N. Richardson, examiner, and witnesses.

Whereupon—

Mr. DAVIS: Before the examination of witnesses is begun, I wish to say that through my oversight I failed to notify the defendant of the hearing this afternoon, which explains his absence, and I would like to reserve the privilege of cross-examination of any witness as may be deemed proper after conversation with him.

R. S. DAVIS, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant in rebuttal, testified as follows:

By Mr. WILLOUGHBY:

Q. Mr. Davis, do you know Brooke Mackall?
A. I do.
Q. How long have you known him?

A. Let me see. I knew him from the time his father lived in that corner house, cor. of C and 4½ N. W.—about twenty-odd
64 years. I have known him twenty-odd years.

Q. Do you know his reputation for truth and veracity?

Mr. DAVIS: Question objected to as incompetent, irrelevant, and immaterial.

A. I think I do.

Q. Is that reputation good or bad?

A. Mr. DAVIS: Same objection.

A. Is it not good.

Q. Would you from his general reputation believe him under oath in a matter in which he was interested?

Mr. DAVIS: Same objection, and the further objection that the witness has not qualified himself to answer this question.

A. I would not.

DORSEY CLAGETT, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant in rebuttal, testified as follows:

By Mr. WILLOUGHBY:

Q. Mr. Clagett, where do you reside?
A. 714 20th street N. W.
Q. Do you know Mr. Brooke Mackall?
A. I do, sir.
Q. How long have you known him?
A. I guess I have known him about twenty years.
Q. Do you know his general reputation for truth and veracity?

Mr. DAVIS: Objected to as incompetent and irrelevant and immaterial.

65 A. I do not know his general reputation, sir.

Q. Do you know what is his reputation for truth and veracity?

Mr. DAVIS: Same objection, and objected further because the witness has disqualified himself to testify to the reputation of the defendant.

A. Only so far as affects my own personal business, never having had any business transaction with the gentleman.

Q. Have you ever heard his reputation for truth and veracity spoken of by people?

Mr. DAVIS: Same objection, and I further object that the question is an attempt at cross-examination of the witness.

A. In a general way I may have done so.

Q. What is that reputation, so far as you heard it, in that respect—is it good or bad?

Mr. DAVIS: Question objected to as incompetent, irrelevant, and immaterial.

A. It is questionable.

Q. Would you say it is good or bad?

Mr. DAVIS: Same objection.

A. Well, as between those two extremes—those two extreme points—I should say it was bad.

Q. Judging from that, from what you have heard of it, would you believe him as a witness under oath in a case wherein he was interested?

Mr. DAVIS: Same objection.

A. That would be a hard question for me to answer.

Cross-examination.

By Mr. DAVIS:

Q. You have had personal differences with Mr. Mackall, have you not?

66 A. I have, sir.

Q. And on one occasion assaulted him, did you not?

A. It might be termed an assault.

Q. You were fined in the police court, were you not?

A. I was, and I only testify here in relation to matters that pertain to myself individually.

DORSEY CLAGETT.

Subscribed and sworn to before me this 12th day of April, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

BRAINERD H. WARNER, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant in rebuttal, testified as follows:

By Mr. WILLOUGHBY:

Q. Mr. Warner, where do you reside?

A. In Washington.

Q. Do you know Brooke Mackall?

A. I know him by sight and appearance. I have no intimate acquaintance with him.

Q. How long have you known him?

A. Well, I presume I have known him by sight for twenty or twenty-five years.

Q. Do you know his reputation for truth and veracity?

Mr. ——: Objected to as incompetent and irrelevant and immaterial.

A. I never made any inquiry about it.

Q. Have you heard it spoken of frequently in the community?

Mr. DAVIS: Same objection: and, further, because the
67 question is leading.

A. I have heard it discussed that he was a litigant and belligerant.

Q. Have you heard his veracity questioned and discussed——

Mr. DAVIS: Same objection.

Q. —or spoken of?

A. Well, I do not know really what I have heard. I could not say.

Q. Would you say—what would you say as to his reputation for truth and veracity, whether it is good or bad, so far as you know or have heard?

Mr. DAVIS: Same objection, and I object further upon the ground that the witness has disqualified himself to answer the question.

A. Well, that is a difficult question for me to answer. I have heard people speak of him as a very peculiar man. I do not think I have heard his reputation for truth and veracity discussed. As I have said, I have heard assertions made against him.

BRAINARD H. WARNER.

Subscribed and sworn to before me this — day of March, 1894.

——— ———,
Examiner in Chancery.

Subscribed and sworn to before me this 12th day of April, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

JOHN W. DOUGLASS, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant in rebuttal, testified as follows:

68 By Mr. WILLOUGHBY:

Q. What is your first name?
A. John W.
Q. You reside in Washington?
A. I do.
Q. Do you know Brooke Mackall?
A. Yes, sir.
Q. How long have you known him?
A. Well, I came here in 1869. I suppose I have known him twenty years of that here, more or less.
Q. Do you know his general reputation for truth and veracity?

Mr. DAVIS: Objected to as incompetent and irrelevant and immaterial.

A. Well, yes, sir; I suppose I do—I do.
Q. Is that reputation good or bad?

Mr. DAVIS: Same objection and because the question is leading.

A. Bad.

Q. Would you from what you have heard generally of him believe him under oath in a matter wherein he was interested?

Mr. DAVIS: Same objection.

A. I would not.

Hereupon the further taking of testimony in this cause was adjourned until Tuesday, March 27th, 1894, at the hour of 3.30 p. m.

MASON N. RICHARDSON,
Examiner in Chancery.

WASHINGTON, D. C., *March 27th*, 1894—3.30 o'clock p. m.

Met, pursuant to adjournment, at the law offices of W.
69 Willoughby to take further testimony for and on behalf of the complainant in rebuttal.

Present: A. A. Birney, Esq., for complainant; W. Willoughby, Esq., P. P.; H. E. Davis, for respondent; M. N. Richardson, examiner; the respondent, Brooke Mackall, and witnesses.

Whereupon R. S. DAVIS, a witness heretofore sworn, being recalled for cross-examination, testified as follows:

Cross-examination.

By Mr. DAVIS:

Q. Mr. Davis, of what character has been your acquaintance with Mr. Mackall, business or purely social?

A. I never had any business transaction with him, just simply a speaking acquaintance, as I have with a thousand other men that I meet on the street.

Q. You never had any relations of an unpleasant nature with him?

A. None that I can recollect. Perhaps he can refresh my recollection, if such happened.

Q. Did you not have an altercation with Mr. Mackall some years ago, during the first administration of Mr. Cleveland, in front of the Ebbitt house, in the presence of Col. Peabody and others?

A. No, sir; I would not have an altercation with Mr. Mackall anywhere, in front of the Ebbitt house or anywhere else.

70 A. I am only asking you if you do not recollect a verbal altercation with him—that you had with Mr. Mackall, such as I have inquired of—in which pretty violent language was used on both sides, and there was a very free expression of opinion.

A. I have no recollection at all. I would not use violent language to him. I would not provoke such a man as him by using violent language, or if there was anything passed between myself and Brooke Mackall that would be calculated to make him raise his language or make him retort I would walk off and leave him.

Q. I understand you to say that you had no such altercation with him?

A. I have no recollection of anything of that kind. He may refresh my memory if I did and I will tell you all about it if he will refresh my memory.

Q. You know Major Peabody, do you not?

A. I do.

Q. Do you remember another occasion, inside the Ebbitt house, when the name of Mr. Jesse B. Wilson was being canvassed for District Commissioner, that you made some remark about Mr. Wilson, which provoked verbal altercation between you and Mr. Mackall, in which you both used very strong language towards one another?

A. I do remember that occasion.

Q. Well, your relations with Mr. Mackall for some years have personally not been pleasant?

A. He has always been an offensive man to me, and I never would have anything to do with him, and now I want to explain the Ebbitt House business. I was sitting in the Ebbitt house one evening in conversation with one or two other gentlemen and something was said about Jesse B. Wilson, that he was an applicant for District Commissioner, and I said I did not think
71 Jesse B. Wilson would accept that place, and, furthermore, I did not think he would be just the man to put there, because it requires a lawyer to fill those offices down there, and then he said—he spoke up and made some offensive remark to me, to which I did not reply.

Q. Did you not make some remark about Mr. Wilson watering whiskey and sanding sugar, in some way, which Mr. Mackall resented?

A. I do not recollect of anything of the kind, because every man that sells whiskey, I suppose, waters it. I water mine.

Q. Do you sand your sugar?

A. No, sir; I never sold sugar.

Q. You do not answer my question?

A. Repeat that question.

A. Did you not in that conversation speak of Mr. Wilson as a dishonest man, who made his money by sanding sugar and watering whiskey, and did not Mr. Mackall resent the imputation, and was not that the cause of the angry colloquy that took place between you?

A. I did not, and that sounds exactly like the creation of Brooke Mackall's brain or intellect. There is not a word of truth in it.

Q. Whom did you ever hear speak of Mr. Mackall's reputation for truth and veracity?

A. I have heard his brother speak of it.

Q. Anybody else?

A. I heard you speak ill of him once.

Q. When?

A. When he had that fracas with Dorsey Clagett up here
72 at the court-house.

Q. What did you hear me say about him—anything about his truth and veracity?

A. No, sir; you said that he was a cantankerous fellow, and that it was very difficult to get along with him.

Q. What did his brother say about him?

A. His brother denounced him in the court-house one day, to my knowledge.

Q. Which brother?

A. I only know one of his brothers.

Q. Which brother—Leonard?

A. The youngest.

Q. The one with whom he had the lawsuit?

A. I think so. I do not know about that, but I think it was the youngest brother; and, talking about that lawsuit, well, we met incidently in the Ebbitt house one evening. He said that his brother Brooke testified in court that he would not believe his sister on oath, and he said, He is the damnedest liar that I have ever known.

Q. Can you fix which brother that was?

A. It is the man that has the cross-eye—the cross-eyed brother.

Q. That is the older brother—Leonard?

A. That is the man; I see him occasionally here.

Q. The one that has the cast in his eye?

A. Yes, sir; that is the one. The fact that impressed me and makes me recollect that was this. The fact which shocked me was when he told me that Brook- Mackall, his brother, testified in court that he would not believe his sister on oath.

73 Q. Besides Leonard Mackall and myself, did you hear anybody speak about Brooke?

A. Well, it would be very difficult matter for me to tell. I heard so many talk of him, and I never heard anybody speak well of him.

Q. Now, I am talking about his truth and veracity, and not about his cantankerousness.

A. Well, about his truth and veracity?

Q. Name anybody besides Leonard Mackall and myself whom you have heard speak of his truth and veracity unfavorably.

A. I do not remember now, except his brother, that I have just told you about.

Q. You know, do you not, that in that litigation with his brother Mr. Brook- Mackall was entirely vindicated by the Supreme Court of the United States through the services of Judge Willoughby?

A. That is a speech you will have to use to the court; but as a matter of argument with the witness, I do not know anything about that.

Q. You have come here to speak of Mr. Mackall's reputation. I want to know if you do not know that as a part of his reputation.

A. I do not know anything about that. That is a matter of argument for you to make hereafter on the testimony.

Redirect examination.

By Mr. BIRNEY:

Q. In saying that you cannot name any other persons, as you have, in effect, you have spoken of Brooke Mackall's reputation for truth and veracity, do you mean to be understood as saying
74 that the persons named are the only persons you have heard comment on his veracity and truth, or are there others you cannot name?

Mr. DAVIS: Objected to as leading.

A. I can answer that without hurting anybody. I have heard Brooke Mackall's character discussed by so many people and talked of as being a disagreeable, objectionable man, and I could not name the number of persons that I have heard discuss his character, because I have heard it discussed for years and years here, and, as I have already said, I never heard a man speak well of him. He has always been a disagreeable man to me, and I have never had anything to do with him.

Q. In those discussions in which you heard him spoken of was his character for truth and veracity mentioned?

Mr. DAVIS: Same objection, and I object further because this is properly direct examination.

A. Well, I can answer that without hurting you. No, sir; but I have heard him discussed so much about the court-house and in the court-house, in the streets, on the steps, in the rooms, and around the court-house and around the place here for twenty years that I could not positively name any man.

Q. Then the difficulty is in the names and not the reputation?

A. My difficulty is in naming anybody that discussed that single subject, but I heard his character, as I have already said, discussed so much around the court-house and in the court-house and about that it would be utterly impossible for me to name anybody except the two that I have named. What I said about Mr. Harry Davis, that he was a cantankerous fellow, why, that amounts
75 to nothing.

R. S. DAVIS.

Subscribed and sworn to before me this 31st day of March, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

WILLIAM B. WEBB, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant in rebuttal, testified as follows:

By Mr. BIRNEY:

Q. You are a member of the bar and have been such member for a number of years?

A. Yes, sir.

Q. In equity cause No. 2373, in which Alfred Richards was one of the parties complainant and Brook Mackall was a party defendant, were you of counsel for Mr. Alfred Richards?

A. I was, sir.

Q. You are familiar, are you not, with the details of that litigation?

A. Yes, sir; it has been so long ago that I may forget some of them, but I think I remember pretty well what took place in those cases.

Q. Mr. Webb, of what property did Mr. Richards take possession under the deed from the marshal of the United States affecting lot 7, in square 225?

A. He took possession of all of that property *up* the reason, as I understood, the deed covered the whole of the property on the corner of 14th street and New York avenue.

76 Mr. DAVIS: I object to the answer as incompetent.

Q. Of what property was he in possession during the pendency of the cause No. 2373?

A. He was in possession of the whole property.

Q. At what time did he relinquish possession of it?

A. When the Supreme Court of the United States decided the case against Mr. Richards. He then abandoned possession of all the property except that upon which the house stood—occupied by the house.

Q. Do you remember at what time that decision was rendered?

A. I do not. I cannot remember the date.

Q. What was the question before the Supreme Court of the United States in which that decision was rendered?

Mr. DAVIS: Objected to as calling for testimony appearing of record.

A. Well, I do not know that I can tell you exactly. There were several questions before the court.

Q. There were several appeals in that case?

A. Yes; but the principal question was the right to this piece of property under the sale by the marshal, the difficulty being to determine what was the south boundary line of the piece of property conveyed by the marshal, whether it ran parallel to New York avenue or ran in a direct line from the line of 14th street to the rear of the lot, taking off a triangular piece. We contended that the property taken was a parallelogram piece of ground, bounded on one side by 14th street, one side by New York avenue, on
77 the south side by a line parallel to New York avenue, and on the rear by a line parallel to 14th street.

Q. Do you remember how far from New York avenue that parallel line was which you claim it ran to?

A. It was the width of the house; the width of the 14th-street front of the house.

Q. And was that the piece of property that you have spoken of as the piece of which Mr. Richards was in possession?

Mr. DAVIS: Same objection.

A. Yes, sir.

Q. And that was surrendered, I think you said, after the decision of the Supreme Court of the United States?

A. Yes, sir.

Q. Was there a gate or a fence?

A. My recollection is that there was a gate on New York avenue.

Q. Who had the key to that gate during the time you have mentioned?

A. I think that it was kept by Mr. Joseph C. G. Kennedy for Mr. Richards; that is my recollection of it.

Cross-examination.

By Mr. DAVIS:

Q. Mr. Webb, the suit number 2373, in equity, of which you were of counsel for Mr. Richards, was a judgment creditors' suit, was it not?

A. I think it was.

Q. And the supreme court of the District of Columbia gave a decree against Mr. Mackall in that suit, adjudging him to be the owner of all of the lot except what passed under the marshal's deed
78 and decreed the sale of all except what passed under the marshal's deed, did it not?

A. Yes, sir; the supreme court of the District of Columbia made a decree authorizing the sale by trustees of all of that property except that sold by the marshal.

Q. And in its decree that court expressly saved the question as to what passed under the marshal's deed, did it not?

A. Yes, sir.

Q. The question what passed under the marshal's deed to Mr. Richards was a wholly subsidiary and incidental question arising in the attempt on the part of the court to decree in response to the prayers of the bill. That was the truth of it?

A. Yes, sir; I think so.

Q. Now, when you say that Mr. Richards took possession of all the property that passed under the marshal's deed, what do you mean—the whole parallelogram?

A. No, sir; I mean that piece the width of the house, running back to the rear of the lot.

Q. A parallelogram?

A. Yes, sir; I never was with Mr. Richards on the premises and I can only say what he told me, and I was informed by him to that extent, that he was having the line of the fence surveyed and was going to erect a fence along this line parallel to New York avenue, and I was talking to him.

Q. I was coming to that. The fact is your knowledge, if it may be called knowledge, of what Mr. Richards took possession of is derived from him?

A. Yes, sir; I never went on the ground with Mr. Richards.

79 Q. Now, do you not remember after the decree of the Supreme Court of the United States, which restricted Mr. Richards' title to the part of the land commonly occupied by the Palace market, you filed a bill for Richards against Mr. Mackall to enjoin him from interfering with his alleged possession of that parallelogram and for the appointment of a receiver to collect the rents of some little buildings that were there lying outside of the ground occupied by the Palace Market building?

A. After the decision of the Supreme Court of the United States?

Q. Yes, sir.

A. No, sir; I do not recollect that.

Q. It has been developed in the testimony here that such is the fact. There has been put in the record in this case the record in equity cause No. —, which was a suit in equity instituted by you in behalf of Mr. Richards against Mr. Mackall, setting up the alleged possession by Mr. Richards of the parallelogram and asking an injunction and the appointment of a receiver. In that cause Judge Willoughby appeared for Mr. Mackall and filed a number of affidavits tending to show that Mr. Richards was not in possession, and that Mr. Mackall was, and upon hearing the court denied the application for injunction and a receiver. Do you recollect that suit?

A. Well, I recollect a great many of the circumstances that you are speaking of, but I do not recollect the order of the suit. I do not recollect in what order we proceeded or that proceeding was in-

stituted. I remember that there was such a suit, and I re-

80 member my applying for an injunction and for a receiver and all that, but I do not recollect whether it was after the Supreme Court of the United States had passed on the question and had decided the case or before. I should have said that it was before.

Q. The point I want to get at is that such a suit was filed. You remember that?

A. Yes, sir; I remember that such a suit was filed. My recollection is that there was such a suit filed to enjoin Mr. Mackall from interfering with the property there. Mr. Richards told me that Mr. Mackall came to personally interfere with the operation of his men there.

Q. And assaulted him?

A. Yes, sir; he said that he threatened to assault him.

Q. He had him arrested for making that assault?

A. I do not know anything about that, and when I filed a bill to enjoin Mr. Mackall from interfering with the property and I think for the other things that you speak about, and then it was understood that the matter might be deferred for awhile.

Q. You do not pretend to speak against the record; whatever the record says, of course, you will abide by?

A. Yes, sir; certainly.

WILLIAM B. WEBB.

Subscribed and sworn to before me this 31st day of March, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

Mr. DAVIS (to the examiner):

Q. Mr. Richardson, I sent a written request to you today to subpœna Mr. John W. Douglass for cross-examination. Did
81 you receive it?

A. I did.

Q. Did you serve it?

A. I did not; I did not get it in time.

Mr. DAVIS: I wish to give notice on the record that I desire to cross-examine Mr. Douglass and to ask the examiner to cause him to be summoned for that purpose at the next session.

Hereupon the further taking of testimony in this cause was adjourned until Friday, March 30th, 1894, at the hour of three o'clock p. m.

MASON N. RICHARDSON,
Examiner in Chancery.

WASHINGTON, D. C., *March 31st*, 1894—3.30 o'clock p. m.

Met, pursuant to adjournment, at the law offices of W. Willoughby, Esq., to take further testimony for and on behalf of complainant in rebuttal.

Present: A. A. Birney, for complainant; H. E. Davis, for respondent; complainant, respondent, witnesses, and M. N. Richardson, examiner.

Whereupon JOHN W. DOUGLASS, a witness heretofore examined, being recalled for cross-examination, testified as follows:

82 By Mr. DAVIS:

Q. Mr. Douglass, your relations with Mr. Douglass are not pleasant, I believe, are they?

A. I do not know anything to the contrary. I never had any trouble with him.

Q. Did not Mr. Mackall oppose your renomination as Commissioner of the District of Columbia, and in that connection file some complaint against you at the White House?

A. I never heard that he had until this moment. My nomination was not due until the 21st of last December; my term then ran out.

Q. Whom have you ever heard say——

A. Well, now, I could not tell you, Mr. Davis.

Q. Let me finish the question—that Mr. Mackall is not worthy of belief?

A. I do not know that I could mention names. I do not recollect any now.

Q. You never yourself had any personal or business relations with Mr. Mackall?

A. Not the slightest.

J. W. DOUGLASS.

Subscribed and sworn to before me this 17th day of April, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

ALBERT GLEASON, a witness of lawful age, being by me first duly sworn, according to law, for and on behalf of the complainant, testified as follows:

83 By Mr. BIRNEY:

Q. What is your first name?

A. Albert, not Andy.

Q. You reside in Washington?

A. Yes, sir.

Q. How long have you staid or resided here?

A. Thirty-two years.

Q. What is your occupation?

A. My friend, I am a contractor, hotelman, farmer, milkman—an all-around man.

Q. Do you know Brooke Mackall?

A. I know him very well; yes, sir.

Q. How long have you known him?

A. I have known Mr. Mackall, I suppose, twenty years, very near.

Q. Are you acquainted with his general reputation for truth and veracity in the community?

Mr. DAVIS: Objected to as incompetent and irrelevant and immaterial.

A. Yes, sir.

Q. Is that reputation good or bad?

Mr. DAVIS: Same objection.

A. Have I got to answer?

Q. Yes, sir.

A. In one way bad; otherwise good. I say some people say Mr. Mackall is a gentleman and is all right; other people who do not feel that way say that he will lie; that he does not keep his word; and I say whether it is more than one-half I could not
84 tell. I have heard both sides of it—I have heard both sides of it.

Q. From what you have heard and know in this respect, how would you regard him as a witness in a case where he was interested and testified?

A. That is a hard thing for me to answer—that is a hard thing for me to answer. I have always taken Mr. Mackall's word.

Q. Would you believe him as a witness if he was testifying where he was interested and it was against his interest to tell the truth?

Mr. DAVIS: Same objection.

A. Under oath I would.

ALBERT GLEASON.

Subscribed and sworn to before me this 17 day of April, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

WESTEL WILLOUGHBY, a witness heretofore examined, being recalled in rebuttal in his own behalf, testified as follows:

By Mr. BIRNEY:

Q. It has been testified by Mr. Mackall in his own defense to the effect that he introduced to you a number of clients and brought to you considerable business other than his own before the time of the making of the agreement here in suit. What have you to say upon that matter?

A. I cannot recollect any client that he brought to me before this agreement was made, except this instance: He was a stock-
85 holder in a turnpike company and wanted legislation to enable them to sell that stock. The precise character of the legislation wanted I do not recollect, and at his instance—I suppose it was—I was employed by the company to procure such legislation through Congress. I did it, spending a great deal of time over it, and finally the act was passed, and for that I received the compensation of $300.00. I had not received that compensation until after this agreement was executed.

Q. How long after?

A. In May of that year.

Q. 1883?

A. 1883. When it was received Mr. Mackall claimed that I was to share that fee with him. I told him that that was not so; I had no recollection of anything of the sort and no intimation of that sort. But he was in very great need of money, and he finally said that he would accept $50.00. I let him have that $50.00 out of that. Now, before this agreement was made I had been in his employment since 1877 and had devoted a very large part of my time to his interests. I had not called upon him for money, because I knew he did not have it. He was impecunious, but expected to be compensated out of property which I hoped to recover for him. Now, I do not recollect any other client before that time. Mr. Mackall was not engaged in procuring clients for me in any sense, but he did *it* in two or three instances recommend his friends to employ me, as I understand. I had several cases for Brooke Mackall for which I had received no compensation. I had one case for
86 him that I did receive compensation for and had received no other compensation, except it is possible that I had had a suit of clothes paid for by him. I could not say certainly whether it is so or not.

Q. All of this answer refers to a period prior to April, 1883, as I understand it?

A. It does.

Q. It has been testified that at his instance or upon his recommendation you were employed in the case of the Otterback estate

and the litigations growing out of the settlement of that estate. Can you tell when that was?

A. In 1885.

Q. In what other cases, if any, were you employed by persons recommended to you by Brooke Mackall?

A. I was employed by Mr. Wilson as receiver to Squiers.

Q. In what year was that?

A. In 1884.

Q. By what other person were you employed?

A. I want to say I give credit to Mr. Mackall for suggesting my name to Mr. Wilson in that case, although Mr. Wilson told me that he consulted other lawyers and other persons before consulting me.

Q. By what other person or persons were you employed on Mr. Mackall's recommendation? In what years?

A. I was employed, I think, probably at his suggestion by Mrs. Bull pertaining to the affairs of the estate of her deceased husband. I think that was in 1884 or 1885. I do not recollect any others.

87 Q. Mr. Mackall has testified that about the first of April, 1888, you drew up the first agreement here in question and submitted it to him for examination and signature, and that Mr. Mackall thought that it was unfair and would not sign it; that after discussing the matter for some few days you prepared in your own hand the agreement that was afterwards executed and he had recopied. What is your recollection upon that subject?

A. I cannot speak distinctly upon recollection about the drawing of the first draft. I have stated that I presumed it was drawn by myself, but I do not believe, upon reflection, that it was. I believe that the first draft was drawn by Mr. Mackall himself, and that it was interlined by me after that. I do not think it is possible that I could have drawn an agreement or a draft of an agreement of that kind. I mean providing, as that did, leaving the matter wholly contingent. I did not have any such thought in my mind.

Mr. DAVIS: I object to the latter part of the answer as not responsive and as incompetent.

WITNESS: There was no such talk as that it was unfair or that he thought that it was unfair. We had some discussion *some discussion* about the agreement, but nothing unpleasant, nor was there any complaint about it that I remember.

Q. Mr. Mackall has testified in respect to that paper as follows: "Before I signed this agreement I said, Judge Willoughby, what does this $5,000 mean? It looks on its face as though it depended entirely upon the success in S118, which was for the recovery of the Palace Market building and ground on which it stood and back rents. He said, I am so confident of winning that case that 88 I stake it on that, and if I do not win that case I do not get the $5,000. If I win it I get it. I am to have no other compensation unless I win that case, and that $5,000 is not to be paid to me. I told him with that understanding I would sign that agree-

ment." Mr. Mackall further testifies that this conversation occurred in your office, nobody else being present.

A. There was no such conversation nor anything like it.

Q. Did you at that time say anything to Mr. Mackall which could be construed to have the meaning which he has stated here?

A. I did not.

Q. Mr. Mackall has testified that in December, 1889, at the time of your disagreement—the disagreement with you touching matters in the supreme court and with reference particularly to the agreement for fees, which you at that time requested him to execute, as follows: "Judge Willoughby handed me that paper for me to execute with a great deal of manner—very offensive. I said, Judge Willoughby, I am a sick man; I am not over my nervous trouble, a malarial attack, and I am not in condition to attend to business; I will not sign an important paper in this condition, and I said, You carry out the agreement of 1883, and I have always been your friend and I will treat you handsomely. He said, You are going to be a very rich man and I want to have an arrangement. Well, I said, do not take advantage of a sick man; do not exact of me on the eve of trial such an agreement as that; I would let the whole thing go to hell before I would sign it. I said, Where is your agreement in duplicate of 1883? He went to his safe and got it
89 out, and I asked him to read it. He said, I am entitled to $5,000 in any event. I said, Read it again, and he read it again. Said I, Sir, when I signed that paper you told me it was dependent—that $5,000—entirely upon $118; now you put another construction upon it. How do I know that the paper you want me to sign is not of the same character as that you put a double construction upon. Now, I said, Judge, just see how you act with a sick man. First you say one thing—— Then he said, You are right; it was dependent upon $118. Now, I said, Judge, just see how you act with a sick man. First you say one thing and then you say another." What have you to say touching this alleged conversation? Did it take place or not?

A. We had a conversation in reference to this agreement of 1883, and I believe that he contended that it meant that it was to be all contingent upon success in $118. I told him otherwise—that that was not the construction of it—and I never admitted otherwise at all. His statement as to that is purely fabrication. The facts in regard to the other proposed agreement which I asked him to sign are these: He had written to me the letter which he has filed here with his exhibit and handed it to me through Major Walker. That is the letter that he wrote to me, which was filed with his exhibit with his original answer. I then sat down and prepared this agreement—proposed agreement. I wrote him the letter of December 7th and enclosed it with the letter of December 7th, 1889. I never had any conversation about it with him whatever, except as is in that letter. He did not come into my office again after we had
90 the conversation which I have detailed in respect to the contract of 1883. I have spoken to Mr. Mackall in September, 1889, telling him that I thought we ought to have an agreement in

regard to my fees. He said he was sick and that he was going to Fortress Monroe, and when he returned he would talk with me about it. It continued along three or four weeks and he did not go, and I spoke to him again about it, and then he said or I spoke to him two or three times, and he said—he finally said that he would come in to see me on a certain day. As I said before, he came in and took away his papers, as I have already said, and after that he came to me on the day which was appointed, and on that day it was that the conversation was had in regard to the contract or the meaning of the contract of 1883.

Q. Do you say on that occasion you did not tell him that he was right in his supposition that your fee was to be a contingent fee?

A. I did not.

Q. Mr. Mackall also testifies that at your conversation with him on that occasion he told you that he had brought you a large and valuable clientage from whom you received a great deal of money, and that you said, You have done that. You have brought me these valuable clients and I appreciate your efforts, and I am willing to pay you and will pay you one-half of all the money I receive from any clients that you have brought and will bring.

A. I did not tell him that exactly. I told Mr. Mackall that I appreciated his having brought me some valuable clients, and that I was willing to allow him whatever he claimed in that respect, and he said, Oh, no; I do not mean to claim anything, and
91 I said, I am willing to allow it; but I think I should receive compensation for my services, I said. He said he would allow me $500 in case we succeeded in the case which was then about to be argued in the Supreme Court of the United States. I told him that would not do.

Q. He has also testified that you have sent to him through John Shipman several times to get him to come back to you and re-employ you as his attorney.

A. That is entirely untrue. I have never done anything of the sort, and never asked his employment again, and never have wanted it.

Q. He has also testified in respect to his occupancy of part of your office, that you gave him the key to your office, saying, Here is the key to my office; come in here and make it your headquarters; you are assisting me not only in your own matters, but in other matters, and you can aid me largely; I ought to have a person here representing me. Did you ever have a conversation or did you ever make a statement to Mr. Mackall to that effect?

A. No, sir; Mr. Mackall was of very little assistance to me in any case. I had—he had the key to my office and was allowed to make it his headquarters because I had so much business of his principally.

Q. How many cases, as nearly as you can remember, did you conduct during the years from 1877 to 1889 for Mr. Mackall in the various courts?

A. Well, I should think fifteen or more.

Q. When was cause 8118 finally decided?

92 A. January 8, 1888.

Q. I now direct your attention to the testimony of Thomas E. Young touching some alleged conversations with you in December, 1889. Mr. Young has testified in effect that at several interviews in that month you discussed with him the terms and proper construction of your agreement with Brook Mackall of April first, 1883. Please state if such conversations occurred, and, if you had them, whether you stated what Mr. Young has said, or something else, and, if something else, please give it.

A. I had no conversation with Mr. Young in regard to the contract of 1883. I had no occasion for discussing that contract with him. I do not believe that Mr. Young knew anything about such contract. He certainly never heard it from me. Mr. Young was not a man of whom I would seek advice. We had no conversation whatever about it. I wrote to Mr. Mackall this letter of December 7th on Saturday, and Monday morning Mr. Young was in my office and told me that Mr. Mackall had had my briefs printed. There was some little talk about the matter then, Mr. Young expressing himself as much against Mr. Mackall as I did; but there was no such thing as advice given; no idea of his being a mediator between us, none at all, and there was no such conversation as he details about it having been unwise for me to have written that letter. I did not say anything like that—"I shall stand firm"—or anything of that sort. It is substantially a fabrication on his part.

Q. Did you say that you had consulted your wife in the matter?

A. No, sir; I did not. My wife knew nothing about it.

93 Q. Mr. Young has testified also that he had—has had no litigation with you. What have you to say upon that subject?

A. We have had very severe litigation. Mr. Young and Mrs. Young brought suit against me, in which suit Mr. Mackall was his adviser and witness.

Q. What was the result?

A. The result was that I recovered from him or his wife, I think, between $3,000 and $4,000. There was a decree against Mr. Young for a portion of this amount, I remember. There was a separate decree, one against Mr. Young and one against Mrs. Young, in all amounting to, I think, $3,700 or $3,800. This was recovered by cross-bill, or it was stipulated that my answer should be regarded as a cross-bill.

Mr. DAVIS: I object to this last question and answer, as there was no proper foundation laid on the examination of Mr. Young to render this testimony admissible, and, secondly, because the answer states matter of record.

Q. In your testimony-in-chief, in an answer, if I remember correctly, to a question on cross-examination, you said in effect that during the pendency of cause 2373 and until its final determination in the Supreme Court of the United States it was conceded that Mr. Richards had possession of the property. Do you now wish to

make any additional statement or explanation of that in the light of the testimony given by Mr. Mackall?

A. There was produced by Mr. Mackall the proceedings in an equity cause, where a bill had been filed against him by Mr.
94 Richards to enjoin him from trespassing upon property corner of New York avenue and 14th street, and an answer of Brooke Mackall's, in which he denies that Mr. Richards had been in possession. At the time I gave my testimony I had no recollection of this answer, and for that reason I wish to say that I regard the facts which constituted such possession as conceded throughout; that it *is* has been conceded that Mr. Richards took possession of that property in 1870, of all north of the line running from a point 11 feet south of the northeast line of that lot westerly parallel to New York avenue; that he put up a fence there, or rebuilt a fence; that he had put a padlock upon the gate and had a key to the gate, and that Mr. Mackall had not done anything to get the possession of that except to build a fence along New York avenue in 1882. He had filed a cross-bill in 1886 in equity case No. 2373, in which he states, under oath, that Mr. Richards had taken a considerable part of that property, lot number 7, and was in the possession of it from 1870 up to that time. That cross-bill was drawn by me and drawn upon the statement of Mr. Mackall that it was true and that Mr. Richards had been in possession of all that property that he claimed under the mechanics' lien from that time, from 1870. I regarded, therefore, all the facts in the case as conceded substantially and finally.

Mr. DAVIS: I object to all the foregoing answer. It states matters appearing not to be stated on the personal knowledge of the witness, and also the statements about the alleged contents of the cross-bill mentioned or any other paper regarded as a cross-bill. The records themselves are the best evidence.

95 Q. When you drew the supplemental bill and cross-bill you have just referred to, in 1886, and in the third paragraph there was stated that Alfred Richards in 1870 took possession of a considerable portion of the premises involved in his suit, and upon which the judgments were charged to be liens and has ever since held possession thereof until the present, and still continues to hold the same, enjoying the rents, issues, and profits thereof, upon whose statement for instruction did you make that statement?

Mr. DAVIS: I wish to ask whether the paper from which counsel is interrogating the witness is in evidence.

Mr. BURNEY: Yes, sir; it is the original of that bill.

A. I made it upon the instruction and statement of Mr. Brooke Mackall.

Q. What property did you understand from Mr. Mackall at that time that the words "considerable portion of the premises involved" had reference?

Mr. DAVIS: I object to the question as incompetent.

A. I understood it to embrace all the property of that lot 7, in square 223, which was north of the line from a point forty-four feet south of the northeast corner of the lot, running parallel to New York avenue to the western line of the lot, and except that upon which the Palace market stands. This cross-bill and supplemental bill was filed for the purpose of recovering the use of that entire property, and was carried on through the courts upon that idea to the Supreme Court of the United States, and the bill was filed for that purpose substantially.

Mr. DAVIS: I object to the statement of the witness as to
96 the purpose for which the bill was filed, as the bill speaks for itself.

Cross-examination.

By Mr. DAVIS:

Q. Judge Willoughby, the litigation that you had with Mr. Young grew out of your relations to him and his wife in the Otterback case, did it not?

A. It did.

Q. And Mrs. Young was one of the Otterback heirs, was she not?

A. That is true.

Q. So that in effect your litigation was, so far as it was with Mr. Young—was with him because of his relation to Mrs. Young and through her to the Otterback estate?

A. No; my recollection is that I had a claim against Mr. Young individually for matters having no connection with the Otterback estate, and that that was embraced in this suit. I had a certificate of stock in my possession belonging to Mrs. Young, which I claimed a lien upon, and the bill was filed against me first by Mrs. Young and afterwards Mr. Young was made a party, and my controversy — with both of them in that suit. I claimed that I had a right to hold that certificate of stock for services which I had rendered him as well as for services which I had rendered to her. In fact, I believed that I claimed that the stock legally did belong to him.

Q. It was stock, was it not, which had come to Mrs. Young from the Otterback estate?

A. Yes, sir.

97 Q. Can you remember the number of that suit?

A. It is number 12742, in equity, in the supreme court of the District of Columbia.

WESTEL WILLOUGHBY.

Subscribed and sworn to before me this 17th day of April, 1894.

MASON N. RICHARDSON,
Examiner in Chancery.

By Mr. BIRNEY: I here announce my case in rebuttal as closed.

MASON N. RICHARDSON,
Examiner in Chancery.

Testimony (Continued).

Filed May 2, 1894.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
vs.
BROOKE MACKALL, Defendant. } Equity. No. 12521.

DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

Be it remembered that at an examination of witnesses begun and held on the 12th day of March, A. D. 1894, and continued from time to time until the 23rd day of March, A. D. 1894, when
98 the within depositions were taken, I, Alexander H. Galt, an examiner in chancery, did cause to be personally present, at the office of Henry E. Davis, Esquire, No. 344 D St. N. W., in the city of Washington, in said District, Brooke Mackall (the defendant), Lilian Pike, Thomas E. Young, Joseph Harper, Westel Willoughby, & Henry Ashton to testify on the part and behalf of the defendant in a certain cause now pending in the supreme court of the District of Columbia, wherein Westel Willoughby is complainant and Brooke Mackall is defendant.

Which said examination was had after due notice and at which, on the day aforesaid, there were present A. A. Birney, Esquire, for the complainant, and Henry E. Davis, Esquire, for the defendant.

ALEXANDER H. GALT,
Examiner in Chancery.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
against
BROOKE MACKALL, Defendant. } Equity. No. 12521.

WASHINGTON, D. C., *March* 12, 1894.

Met pursuant to notice.

Appearances: A. A. Birney, Esquire, in behalf of the com-
99 plainant; Henry E. Davis, Esquire, in behalf of the defendant.

BROOKE MACKALL, the defendant and a witness in his own behalf, being first duly sworn, deposes and says:

By Mr. DAVIS:

Q. You are the defendant and cross-complainant in this case?

A. I am, sir.

Q. How long have you known the complainant, Judge Willoughby?

A. I cannot exactly state; some twelve or more years.

Q. It appears from the pleadings and testimony of the complainant in this case that Judge Willoughby became your counsel in equity cause No. 2373, in the supreme court of the District of Columbia, in July, 1877. Prior to that time was he engaged in any business for you?

A. My recollection is that this was the first case that he had for me.

Q. He continued to represent you in that case until its final disposition?

A. Yes, sir.

Q. It also appears by the pleadings and testimony that on April 10, 1883, you made with Judge Willoughby the agreement which is the subject of this litigation. Do you remember the circumstances under which that agreement was made?

A. I do.

Q. State those circumstances.

A. About the 1st of April, 1883, Judge Willoughby drew up an agreement in duplicate to be executed by us as to what his
100 compensation, &c., was to be for attending to certain cases of mine. There had been an agreement before this—I forget the exact date, but I will endeavor to get it from among my papers. That was signed in duplicate. The paper which I now allude to, that was gotten up about April 1st, 1883, was submitted to me by Judge Willoughby.

Q. Who prepared it?

A. Judge Willoughby. After I had examined it I told Judge Willoughby that it was not such an agreement that I thought was fair and I would not sign it. After discussing the matter for some few days, finally he prepared in his own hand the agreement that was executed and I had it copied at his suggestion by a lady friend of mine, Miss Pike, who wrote a very clear and distinct hand. The agreement, in duplicate, is in her handwriting. I had a copy. It was lost during the trial in the law cause when I was so ill a man.

Q. Did you see the paper that was put in evidence by Judge Willoughby in this case?

A. Yes, sir.

Q. In whose handwriting is that?

A. That is in Miss Pike's handwriting.

Q. What do you say as to that being or not one of the two copies to which you refer?

A. That is one of the copies to which I refer.

Q. Now state what occurred between you and Judge Willoughby with reference to that agreement and its execution.

A. Before I signed this agreement I said, "Judge Willoughby, what does this $5,000 mean? It looks on its face as though
101 it depended entirely upon the success in S118," which was for the recovery of the Palace Market building and ground on which it stood and the back rents. He said, "I am so confident of winning that case that I stake it on that, and if I do not win that

case I do not get the $5,000; if I win it I get it. I am to have no other compensation unless I win that case. That $5,000 is not to be paid me." I told him with that understanding I would sign the agreement.

Q. Where was this conversation held?

A. In Judge Willoughby's office.

Q. In whose presence?

A. Nobody was present.

Q. What followed?

A. We had had for several days a good deal of feeling in the matter, he demanding a very severe agreement—what appeared to me an agreement that two constructions would be placed upon. I did not like his manner; it was very offensive. He seemed to be acting like a man who took the advantage of his position——

Mr. Birney: I object to this statement of the witness as incompetent and improper.

Mr. Davis: Go on.

The Witness: Who took advantage of the situation of being in charge of my affairs to extort from me an agreement that he would not have attempted if he had just been starting in my matters.

Q. With reference to that, Mr. Mackall, it appears that Judge Willoughby was representing you at the same time in this
162 cause 8118, in cause 2373, and in cause 8038, in the supreme court of the District of Columbia. Was he doing any other business for you at that time?

A. He had been attending to matters for me before that and since that, for which I paid him. We also had some matters together, or one matter, I will say, together, in which I was very shabbily treated. I allude to the turnpike case that was before Congress.

Mr. Birney: Counsel for the complainant objects to this testimony for the reasons just given.

A. (Continuing:) I brought him that case, and it was arranged that we were to divide the fee. After everything had been done, he only preparing the papers and I attending to all the real details, seeing the members, &c., in Congress, and if it had not been for me the matter would never have passed or assumed any shape—after the thing was done and the money paid he very rudely said, "You take that," giving me a mere pittance, "or nothing." I would have broken with him then, but I could not afford to do so, because he was in charge of my matters.

Q. At the time this agreement was made what, if any, other counsel had you to represent you in your various matters?

A. I had none.

Q. During the interval between July, 1877, when Judge Willoughby first became your counsel, and the time this agreement was signed, what, if any, counsel had you representing you?

A. I had none. I relied entirely upon him.

Mr. Birney: Objected to as immaterial.

Q. After you had the conversation with Judge Willoughby
103 in which he stated what you have said about the character of the agreement, what, if anything, did he say as to compensation until 1889?

A. Judge Willoughby never pretended, to my knowledge, to construe that agreement otherwise than as I have just stated, which was that the $5,000 was dependent upon the success of S118, until I was recovering from a severe spell of malaria and nervous prostration, and I had to leave the city.

Q. When was that?

Mr. BIRNEY: The last answer of the witness objected to as not responsive to the question and as incompetent for any purpose.

A. That was just before the case S038 came up in the Supreme Court of the United States.

Q. Do you remember when that case came up?

A. It was a few days before the case was heard. I cannot fix the exact date.

Q. It is stated by Judge Willoughby in his testimony and appears from the exhibits to your original answer to have been in the month of December, 1889; how long before the case was to be called?

A. Just a few days.

Q. You filed your original answer in this case, as appears by the record, on the 13th of June, 1890, and you filed with it three papers or copies of them, one being a letter from you to Judge Willoughby under date of December 6th, 1889, another being a letter from Judge Willoughby to you under date of December 7th, 1889,
104 and the third being copy or what purported to be a copy of a paper handed you by Judge Willoughby for execution. What do you say as to those papers being correct or otherwise?

Mr. BIRNEY: Objected to as being clearly apparent that the papers in question have no relation whatever to the papers in this case.

A. They are the papers that were filed in this case, and they are what they purport to be.

Q. When this correspondence, in December, 1889, passed between you and this paper, Exhibit C—the indenture—was presented to you, what, if anything, passed between you and Judge Willoughby in relation to the agreement of April 10th, 1883?

Mr. BIRNEY: Objected to as immaterial.

A. Judge Willoughby handed me that paper for me to execute with a great deal of manner—very offensive. I said, "Judge, I am a sick man; I am not over my nervous trouble and malarial attack, and I am not in a condition to attend to business. I will not sign an important paper in this condition," and I said, "You carry out the agreement of 1883, and I have always been your friend, and I will treat you handsomely." He said, "You are going to be a very rich man, and I want to have an arrangement." Well, I said,

"Judge, don't take advantage of a sick man; don't exact of me on the eve of trial such an agreement as that. I would let the whole thing go to hell before I would sign it." I said, "Where is your agreement in duplicate of 1883?" He went to his safe and got it out, and I asked him to read it. He said, "I am entitled to five thousand dollars in any event." I said, Read it again, and he read it again. Said I, "Sir, when I signed that paper you told
105 me it was dependent—that five thousand dollars—entirely upon S118; now you put another construction upon it. How do I know that the paper you want me to sign is not of the same character that you could put a double construction upon?" Then he said, "You are right; it was dependent upon S118." Now, I said, "Judge, just see how you act with a sick man; first you say one thing and then you say another."

Q. What, if any, explanation did he offer for the execution or desired execution of the paper of 1889?

A. Simply that I was going to be a rich man, he said, and he wanted an agreement with me. I told him I had brought him large and valuable clients, and he had got a great deal of money out of them, I understood—as near as I could get at it, $10,000. He said, "You have done that; you have brought me these valuable clients, and I appreciate your efforts, and I am willing to pay you and will pay you one-half of all the monies that I receive from any clients that you have brought and will bring."
H. H. G. I said, "You will never get another client through me."

Mr. BIRNEY: Answer objected to.

Q. What, if anything, did he say about the compensation provided for by the agreement of 1883 not being adequate?

A. He simply said he wanted another agreement; that I was going to be a rich man. That was about the way he was putting it all the time.

Q. It appears that you did not sign the paper of 1889?

A. I did not, because I had no confidence in any paper that he presented to me.

Q. You have filed with your cross-bill in this case——
106 A. (Interrupting.) I want to state right here, before I forget it, that every client, I believe without exception, that I took to Judge Willoughby have complained to me of his outrageous treatment of them in extorting fees that were outrageous and in mismanagement of their cases.

Mr. BIRNEY: The statement of the witness is objected to as irrelevant.

Q. You have filed with your cross-bill in this case a paper-writing in print, marked Exhibit D, and appearing to be a motion made by you in the Supreme Court of the United States in case No. 8038. What do you say as to the genuineness of that paper?

A. That is a genuine paper. I was compelled to do that to protect my interest.

Q. Under what circumstances did you file it?

Mr. BIRNEY: Objected to as immaterial.

A. Judge Willoughby had abandoned my case in the Supreme Court on the eve of the trial and tried to put thumb-screws on me, a sick man, to extort from me a deed of an interest in every piece of property I had. The court immediately granted the motion and gave me time to employ other counsel.

Q. What about the filing of the briefs in that case?

Mr. BIRNEY: Objected to as irrelevant and immaterial.

A. I in that case, as in all cases, had the briefs—took the manuscript to the printer to expedite it. Judge Willoughby's handwriting was very poor and indistinct, so that I would either copy them myself or get Miss Pike to copy them. He would muss his
107 papers and blot them so that the printers did not want to handle them. Then I would go for the proof and bring it to him and he would run over it, and I would run over it carefully and carry it to the printer and get the briefs, and in no case that I recall did he ever go to the printer except in this case 8095, and when I told him that the briefs would be ready he went there secretly and took those briefs and either carried them himself or had them taken to his office without its being known to me, and I saw them there the next day and took a copy. He knew I had a copy. I had a right to a copy; and then when I looked for them the next day or the day after that they were put in his safe and he told me with a great deal of manner that they were in his safe when I asked him where they were, and having one copy and knowing it was essential to file that in the Supreme Court or my case would be dismissed I, as unwell as I was, got a carriage and went around and had eleven printers at work on Sunday and Monday morning. I had that brief filed by 12 o'clock the next day.

Q. Did Judge Willoughby afterwards represent you in that case?

was

A. He did not. He has sent to me, I understand, through John Chipman, several times since to get me to come back to him, as he was the only man who could manage my business.

Mr. BIRNEY: The statement is objected to as hearsay.

Q. He testifies that he attended at the trial table.

A. He did not attend with my consent. When Judge Wilson suggested that he could aid him I said, "No, sir; I would rather lose my case than that Judge Willoughby should have anything to do with it. He is worse than a highwayman."

108 Q. Did you employ other counsel?

Mr. BIRNEY: Objected to.

A. I did.

Q. Who were they?

A. Senator Blackburn, of Kentucky, and Judge Jeremiah Wilson.

Q. Did you pay those gentlemen anything for their services?

Mr. BIRNEY: Objected to.

A. I did: I paid them one thousand dollars each. I have every reason to believe that Judge Willoughby tried to prevent them from appearing for me unless I agreed to lug him in.

Mr. BIRNEY: The statement of the witness is objected to as irrelevant and irresponsive.

Q. You have said something about bring clients to Judge Willoughby; in that connection I wish to call your attention to a statement made by Judge Willoughby on his examination to the effect that you had a key to his office and was constantly about his office. How did that happen?

A. I had to go to Judge Willoughby's office often to see about my matters and the matters of friends that I would take to him, and I would find him out of the city, and he said to me, "Here is a key to my office; come in here and make it your headquarters; you are assisting me not only in your own matter, but in other matters, and you can aid me largely; I ought to have a person here representing me;" he used to speak of me to others as being not only his client, but his best friend, and I was the best friend the man ever had.

Q. How about being about his office?

A. I was there at his request whenever it was agreeable to
109 me. Sometimes I would not go there for several days and then again I would be there daily, looking after the business, not so much of my own, because they were pretty well along, as other business of clients, seeing them in person and conferring with them, they desiring to talk with me and not through him; they said he was lazy and they could not get him to do anything; they wanted me to stir him up. I can prove this by other witnesses.

Mr. BIRNEY: The statement of the witness is objected to as irrelevant and immaterial.

Mr. DAVIS: I offer in evidence the papers accompanying the original answer of the defendant in this case, marked Exhibits A, B, & C, and also the paper filed with the cross-bill, marked Exhibit D.

Mr. BIRNEY: To all these papers counsel for complainant objects as irrelevant and immaterial for any purpose.

Q. Did Judge Willoughby have any conversation with you about the meaning of the paper of April 10th, 1883, when any one besides the two of you were present?

A. Not that I recollect.

Q. Did you and Judge Willoughby ever have any conversation about that paper when Mr. Thomas E. Young was present?

A. Mr. Thomas E. Young during this controversy, when the case was pending in the Supreme Court, was there daily about his matters, or rather matters of his wife in the Otterback estate, and he tried very hard to bring about a good feeling, a reconciliation; he went first to Judge Willoughby and then came to me—was

backwards and forwards—and he told me what Judge Wil-
110 loughby had said to him.

Q. I do not want that. I only want to know if anything passed between the two of you when Mr. Young was present.

A. I do not recollect of it just now. I may be refreshed.

Q. Judge Willoughby has testified about your taking some papers out of his office. Do you recollect about that?

A. Before I went to Takoma, when I was an ill man, I told Judge Willoughby that I had some valuable papers in packages that I wished to place in his office for safe keeping until I returned to the city. I sent those papers to his office and they were put in a large drawer. I sent them by my colored man, Henry Ashton. When I returned to the city, or a short time thereafter, I went with the same colored man, Judge Willoughby being in his office, and told him what I came for and took the papers with his consent. I said to him, "Judge, those papers have been opened; somebody has been through this package of papers." I took them and some notes I had made and some other things that belonged to me in another small drawer and left the office. I took none of Judge Willoughby's papers, either intentionally or by accident.

Q. Did you or not at that time take any papers except those which you had sent by your man servant?

A. Only that memorandum that I have alluded to. That was mine. I always kept a certain number of the briefs and he kept a certain number in every case. I want to say in this connection that there was a great controversy about a book that was stolen from his office. There was a great deal of talk about that and other papers that had disappeared during this very time, or rather the
111 time I was about his office. Bill Fletcher made some reflections upon Judge Willoughby, but I had nothing to do with it and knew nothing about it. If any papers were taken out of that office they were taken by somebody else and not by me, and Judge Willoughby knew that when he insinuated that in the other trial. It is a most ungrateful return for the kindnesses he has received at my hands.

Mr. Birney: The statement of the witness is objected to as irresponsive and immaterial.

Q. At the time the paper of April 10th was executed, what were the relations between you and Judge Willoughby in point of confidence and reliance?

A. I had the greatest confidence in him, although I thought he was trying to drive a pretty hard bargain with me. I had confidence in him as a honest man, but I though he was trying to drive a hard bargain.

Q. Upon whose advice, except that of Judge Willoughby, if anybody's, did you rely at that time?

A. I relied entirely on Judge Willoughby at that time. I had confidence in him and believed him to be an honest man and an able lawyer.

Q. The point is whether there was anybody else upon whom you were relying for advice or counsel.

A. Nobody; none.

Q. At the time this agreement of April 10th, 1883, was signed, what was the condition of the cause No. 8118 with respect to hearing?

112 A. I think it was heard in a very few days, if not directly, after that; I cannot recall exactly.

Q. It appears that this agreement was signed on the 10th of April, 1883, and a decree of the court was made on the 12th, a difference of two days. Were you present at the hearing of that cause?

A. I was.

Q. How long did it last?

A. I do not recollect.

Q. Can you remember whether it lasted a day or more?

Mr. BIRNEY: Objected to as being a suggestion.

Q. What is your recollection as to the date on which the agreement was signed? Was it the same day on which the case was submitted or a different day?

A. I do not recollect.

Q. What, if anything, was said to you at the time the agreement was presented to you for signature as to your signing its being a condition of Judge Willoughby's continuing in the case?

Mr. BIRNEY: Objected to as leading.

A. I was pretty well satisfied from his manner and what he said that he would abandon my matters right there, and I could not afford that.

Q. What I want to get at is what, if anything, he said apart from his manner.

A. I cannot recollect the words, but I recollect there was a good deal of feeling and forcing and exacting in his whole conduct and everything about him, and I had to submit to it.

Mr. BIRNEY: Objected to as irresponsive and as stating the
113 opinion of the witness.

A. (Continuing:) He gave me to understand from his manner and what he said—I cannot recollect the exact words—that he would abandon my case unless I came to his agreement.

Q. I will ask you the direct question, Mr. Mackall, whether you would have signed that paper if you had understood its meaning to be different from what Judge Willoughby stated it to be to you.

A. I would not, sir.

Q. And would you or not have signed it if you had not supposed that Judge Willoughby would abandon your causes unless you did sign it?

Mr. BIRNEY: Objected to as leading.

A. I had to sign it because it was on the eve of the trial.

Q. Well, if you had not supposed that Judge Willoughby would

have given you up if you had not signed it, would you have signed it?

Mr. BIRNEY: Objected to as leading.

A. I would not if I had understood its exact meaning. I would have taken the chances of being thrown up, of his abandoning my business, my cases.

Q. After that agreement was signed what, if any, further agreement as to compensation did you have with Judge Willoughby?

A. None that I recollect. He wanted to have one, but I declined to sign it.

Q. You refer to the one of 1889?

A. Yes, sir. I had lost all confidence in him and would sign no paper he would present to me.

114 Q. Besides your refusal to sign the paper presented to you in 1889, what, if any, reason was there for Judge Willoughby abandoning your cause 8038 in the Supreme Court of the United States?

Mr. BIRNEY: Objected to as immaterial and irrelevant.

A. I believe that was the only reason. I knew of no other.

Q. Prior to Judge Willoughby's presenting you about the 1st of April, 1883, with the paper to which you have referred, was there or not any conversation or communication between you on the subject of compensation?

Mr. BIRNEY: Objected to for the reason that any conversation that may have been had at that time is immaterial since the agreement was reduced to writing.

Mr. DAVIS: I want to show that there was none.

A. Only as I have stated. He prepared an agreement and submitted it to you, but I would not sign it, and, after some days' controversy over it, finally this agreement was signed.

Q. My question is whether there was anything back of April 1st.

A. No, sir; except another agreement. I have told you I had another agreement that he substituted this in the place of. That agreement I will try to produce here.

Q. How long before the 1st of April was that?

A. I cannot tell.

Q. Were you ever in the real-estate business?

A. I have handled real estate in special cases.

Q. Were you ever in the business regularly?

A. No, sir; I never was.

Q. In the answer of the complainant to your cross-bill he

115 refers to a letter of yours, Saturday, September 17th, 1889, evidently meaning December 7th. Do you remember any letter written by you on that date?

A. I cannot recollect the date, but I sent him a letter.

Q. Well, you mean the letter that is annexed to your answer?

A. Yes, sir.

Q. Did you send him any other letter?

A. Not that I recollect.

Q. In his answer to the cross-bill he also sets up what purports to be a copy of a letter written by him on the 23rd of December, 1889, stating in substance that he had not left your cases, and that if you should confer with other counsel in relation to them you should inform them of his position, so that they might fully understand that he was still counsel and should be consulted in reference to any action that might be proposed in the cases. Did you see such a letter?

A. Yes, sir; I did; but took no notice of it because I had employed other counsel and would not take any notice of him under any consideration.

Q. In cause No. 3611, at law, in the supreme court of the District of Columbia, in which Judge Willoughby obtained a judgment against you for $12,000 and interest, what was done with the judgment in that case?

A. I paid it because I was too sick a man to fight it. The whole thing was obtained by perjury, and I can prove it. He charged me for negotiating two loans, one for seven thousand dollars and the other for thirty thousand dollars, and he knew at the time that he was committing perjury. He did not negotiate those
116 loans. I swore he did not and Jesse B. Wilson swore he did not, and we will both swear before the grand jury that he did not.

Mr. Birney: The answer of the witness is objected to as irrelevant and irresponsive.

The Witness: Mr. Birney, the attorney in this case, is also District attorney. He seems to think that pool-selling and horse-racing are immoral, but he does not think that perjury is wrong in a brother lawyer when he gets part of the swag.

Adjourned until tomorrow, Tuesday, March 13th, at 3.30 p. m.
A. H. G.

Washington, D. C., *March 13th*, 1894—3.30 p. m.

Met pursuant to adjournment.
Present as before.

Whereupon Brooke Mackall, the defendant,

Examination resumed.

By Mr. Davis:

Q. What is your recollection as to the matter testified to by Judge Willoughby that his present claim under this agreement of April 10, 1883, was excluded from consideration in the cause No. 30611, at law?

A. I was so unwell at the time that I am not competent to tell much what took place.

Q. Who represented you in that cause?

A. Judge Wilson and Mr. Hoehling.

Q. Judge Jeremiah Wilson?

117 A. Yes, sir.

Q. With reference to the upper portion of the lot No. 7, in square 223, which was involved in the Richards matter, how much of that did Mr. Richards actually take possession of under the marshal's deed of 1870?

A. The building and a small piece of ground immediately south and adjoining the building, containing 867 feet. He repaired to some degree the fence on New York avenue, on the side of the building, and put a lock on it. There was a double gate there which was used by his tenant in the corner house. Fuel and other things were brought in and out of that gate. There was no enclosure on the south boundary of the property that he claimed to hold under the marshal's deed, except what I have stated.

Q. I do not get it very clearly from you. You built the Palace market, so called, and the marshal's deed was for an unascertained part of the lot, including the part on which the building actually stood?

A. Yes, sir.

Q. The Supreme Court of the United States afterwards in its opinion expressed the view that Richards was entitled under that deed only to the part on which the building actually stood?

A. Yes, sir.

Q. But had the line 44 feet south of the northeast corner of that lot been run parallel with New York avenue it would have included a number of square feet of ground lying outside of the ground occupied by the building itself?

A. Yes, sir.

Q. Now, how much of that piece 44 feet parallel with New
118 York avenue did Mr. Richards actually enter into occupation of—anything more than the market building itself?

A. The market building and 867 feet immediately south by a small fence and wood shed; nothing else.

Q. What about that strip to the west end of the market building?

A. There was no enclosure on the south line; it remained as it always had been.

Q. How about an enclosure on the New York avenue side?

A. That was as it always was, except that he repaired the fence and put a double lock on the gate.

Q. Who built that fence?

A. I did.

Q. Before or after the marshal's sale?

A. Before.

Q. After the opinion of the Supreme Court of the United States to which I have referred, what, if any, change was made in the physical situation as to the portion of that strip west of the building?

A. None, except I not very long ago got possession of the small place south of the building 867 feet.

Q. Was Mr. Richards ever actually in possession of the portion of the strip west of the building?

A. I think not. He claimed that he was, but he only had that possession of going over it for awhile.

Q. He put a lock on the fence or gate?

A. It was a double gate. In order to ascertain that beyond question I examined the record in 2 73 this morning and find that I stated that Mr. Richards claimed that he had possession;

119 I did not state that I claimed it, as Judge Willoughby has stated. I said he claimed.

Mr. Birney: Objected to, as the record will speak for itself.

Cross-examination.

By Mr. Birney:

Q. After the marshal's deed did not Mr. Richards immediately assume to control the fence and gateway through it on New York avenue line?

A. No, sir; not for a long time afterwards; that is my recollection.

Q. For how long a time?

A. I cannot state exactly.

Q. About how long?

A. I cannot tell; it is impossible for me to tell.

Q. He did at one time during the course of this litigation assume to control it, did he not?

A. He assumed it.

Q. And did he not assume to control it by virtue of his deed from the marshal?

A. He only had control of it, as I say, for awhile. He was allowed to use that gate.

Q. By whom was he allowed?

A. I did not do anything about it. I let the thing go on, I had so many things to annoy me.

Q. Did he not also use the strip?

A. He did not, except, as I have stated, to go over it and have some ashes put there.

Q. He used it for storing fuel, coal, and had some ashes put there?

120 *Q. He used it for storing fuel, coal, and had some ashes put there?*

A. He did not. He stored no fuel and coal.

Q. Did he not repair the fence on the north line?

A. He did not. Except on one occasion, I have repaired it often.

A. H. G.

Q. Did you repair it while Mr. Richards was in possession or claiming to be in possession?

A. Yes, sir.

Q. What repairs did you make to it?

A. I have repaired it—put on boards and put up an extra post occasionally.

Q. At what time did you put an extra post on?

A. At various times.

Q. When?

A. I cannot tell exactly.

Q. In what year?

A. More or less, right straight along. Whenever it needed repairing I did it.

Q. Did you make any repairs to that fence up to the time of the decision of the Supreme Court of the United States construeting the question of Richards' right?

A. I did often, and after the decision I tore the whole thing down and built the structure that is there now—the paneling.

Q. During the time I have mentioned who had the key to the gate?

A. He had it for a time, and I put another lock on it and had the key myself.

Q. For how many years did he have the key?

A. I do not think he had it very long. He claimed he had it.

121 Q. What do you mean by very long?

A. It is impossible for me to tell you how long he had the key.

Q. Who paid the taxes upon that strip of ground during the time of your contest with Richards for it?

A. I paid it finally. He paid nothing. I do not believe he paid a dollar's taxes during the whole time.

Q. Didn't he first pay the taxes?

A. I do not know. I am not sure about that.

Q. Are you aware that he had it surveyed and laid off a plat recorded in the surveyor's office?

A. There is no doubt about that.

Q. That is true, is it not?

A. Yes, sir; but he never occupied it except as I have stated. For a good many years there were no taxes paid.

Q. For the first two or three years after the Richards deed was made don't you know he paid the taxes on it?

A. I do not know. He may have. I do not recollect.

Q. In your settlement with Richards, made after the conclusion of the litigation in 2373, didn't you reimburse Richards for the taxes he paid on that strip of property?

A. I do not recollect.

Q. Have you a memorandum of that settlement?

A. I have not.

Q. Did you keep any memorandum?

A. I did not.

Q. Do you say that you did not allow him or reimburse him in that settlement?

A. I do not say anything of the kind. I have no recol-

122 lection of it. All I recollect is there were a great many thousand dollars that I paid or got Mr. Jesse Wilson to pay when I got that loan of $30,000, the money having come through him as president of the company, the Mutual Fire Insurance Co.

Q. Mr. Mackall, who drew the first draft of the agreement of April 10, 1883?

A. Judge Willoughby.

Q. Did you have any conversation with him upon the subject of a contract for fees within a few days before that time?

A. I do not recollect, but I suppose I had.

Q. Have you any recollection of it?

A. I have not.

Q. Your first distinct recollection is that he presented you with this paper?

A. Yes, sir; to take the place of a former written agreement, which I hope to produce. I sent for it today, but have not been able to get it yet.

Q. Is your recollection distinct that this draft was prepared by Judge Willoughby?

A. Yes, sir; very distinct.

Q. What did you do with it?

A. I took it, looked over it, examined it, and kept it two or three days. Finally I told him I would not sign that and raised certain objections, which resulted in his preparing this agreement.

Q. How did the draft which was first given you differ from the present draft?

125 A. It is very materially different. I hope to produce that, too; it may be among my papers.

Q. Was it drawn in duplicate or was it single?

A. It had not assumed the shape of signing, and therefore it was not in duplicate; my recollection is that it was not in duplicate. It was submitted to me.

Q. You made certain objections to the draft as first submitted to you and then, you say, it was changed?

A. Very decidedly changed.

Q. By whom was it changed?

A. By Judge Willoughby.

Q. Was it changed by you?

A. I may have made some suggestions.

Q. Did you do anything more than make suggestions?

A. I think not.

Q. Did you draw yourself an agreement?

A. No; I think not; I am not in the habit of doing that.

Q. Is your recollection distinct on that point?

A. Well, I do not think I did. I won't say positively, but I do not think I did; that would not be like me.

Q. You have no recollection, then, of that?

A. No, sir.

The witness here asks for a copy of Exhibit "A" to his original answer in this case, which was handed to him.

Q. Why do you want Exhibit "A"?

A. To refresh my memory to give proper answers, truthful and correct answers, and not to be caught by you.

Q. Then you have no independent recollection of the
124 matter and depend on Exhibit "A" for your recollection?

A. No, sir; I do not depend on anything, but I thought there was possibly something here that would refresh my memory.

Q. In whose handwriting was the corrected draft given you by Judge Willoughby, as you say, after the suggestions of change made by you?

A. Judge Willoughby's handwriting, I presume.

Q. Have you any recollection on the subject?

A. I have not.

Q. Was it signed in duplicate?

A. Oh, I do not recollect that.

Q. What did you do with it?

A. I do not know. I may have it among my papers. If I can find it I will produce it with great pleasure.

Q. You have testified that the agreement as completed was made by Miss Pike?

A. Was copied by Miss Pike after he had drawn it on account of his handwriting being so indistinct.

Q. Did you at any time make a copy of any of the papers in your own handwriting?

A. I do not recollect; it is impossible for me to recollect.

Q. The paper as prepared by Miss Pike, as I understand you, was prepared in duplicate?

A. Yes, sir.

Q. Was that the only duplicate preparation of the agreement made about that time?

A. The only thing that I recollect.

Q. You have no recollection of an agreement made by you
125 in duplicate?

A. I have not.

Q. Or one made by Judge Willoughby in duplicate?

A. I have not.

Q. Do you know what became of the paper which was submitted to Miss Pike to be copied?

A. I do not; she may have it; I hope she has, or I may have. I have searched and am still searching for it.

Q. In whose handwriting was that, if you remember?

A. Is what?

Q. The paper which you submitted to Miss Pike.

A. Judge Willoughby's handwriting, I think.

Q. And you have no recollection of a paper-writing of yours that you submitted to Judge Willoughby for signature?

A. I may have copied the paper, but Judge Willoughby asked me to keep his and asked Miss Pike to copy that. I do not say that I did not; it may have happened.

Q. Do you remember whether the changes made by Judge Willoughby from the first draft, under your suggestion, were made upon a separate sheet of paper or by interlineation?

A. Oh, I do not recollect anything about it.

Q. (Handing witness papers.) Look at the papers which I now hand you and say in whose handwriting is the body of each.

A. (Examining.) This may have been copied by me——

Mr. DAVIS: That is not the question.

The WITNESS: Well, it is in my handwriting.

Q. In whose handwriting are the interlineations?

A. The- seem to be in Judge Willoughby's handwriting.

Q. The addition at the foot of both is in whose handwriting?

126 A. Judge Willoughby's, both.

Q. Now, is it not true that you prepared those papers and presented them without interlineations to Judge Willoughby for signature?

A. It is not true. I think this explanation is the correct one as to those papers.

Q. I wish you would testify from recollection and not from what you may suppose. If you have any recollection upon the subject you are — liberty to state it.

A. I do not recollect these papers at all, but I was in the habit of copying papers from Judge Willoughby and submitting them to him, and he was in the habit of making additions and then I would copy it, or he would have it copied or copy himself the thing out complete, of the paper or whatever it was, and hand it to me and I would get Miss Pike to make the complete copy. That is my explanation of these papers.

Q. Can you mention any papers of that kind that were ever prepared by you and changed by Judge Willoughby and prepared in duplicate?

A. Lots of cases. In most every case copies were made for the printer, and I can bring Miss Pike here to corroborate that.

Q. This paper was not for the printer, was it?

A. This paper does not seem to be for the printer, but I say that was done in a number of cases.

Q. Is not that the paper, with its interlineations, which was taken to Miss Pike to be copied?

A. No, sir; it is not. It was in his handwriting, and I can prove that by her.

127 Q. Can you point out any distinction or difference between the contract as signed and those papers with the interlineations?

A. Do you expect me to answer a question on the spur of the moment for the purpose of catching me without having time to compare?

Q. I ask you now to read over the paper and then say whether there is any difference.

A. I decline to do it without sufficient time to make a proper comparison in order to prevent any trick or catch.

Mr. BIRNEY: I offer those papers in evidence and ask——

The WITNESS (interrupting): I would like to say further that I can account for these papers——

Mr. BIRNEY: I object to the witness making any statement unless he be inquired of by counsel.

The papers referred to were offered in evidence and are marked Complainant's Exhibits 1 and 2 respectively.

Redirect examination.

By Mr. DAVIS:

Q. Look at these papers again and state whether you have any recollection of the circumstances under which they were written out in your handwriting.

A. (Examining Exhibits 1 and 2.) They were evidently copied by me from an agreement prepared by Judge Willoughby, who writes a very poor hand, and from that agreement of his I copied these papers at his suggestion to submit to him and he made additional changes.

Mr. BIRNEY: Answer objected to as not pretending to state
128 the witness' recollection and as being irresponsive to the question.

The WITNESS: I do state that as my recollection now, being refreshed by the papers.

Q. Had you at that time any sufficient knowledge of the law and legal forms to enable you to prepare a paper of that kind?

A. I had not except what I got from Judge Willoughby. I never attempted to do anything but to copy his papers at his request.

Q. Your answer does not meet my question. I ask you whether you had any sufficient legal knowledge or knowledge of legal forms to enable you to prepare such a paper.

A. I had not and never pretended to do it.

Q. You say that before this agreement of the 10th of April, 1883, was put into its final form a draft was submitted to you by Judge Willoughby about the 1st of April?

A. Yes, sir.

Q. And, as I understand you, you have thus far failed to find that draft?

A. Yes, sir.

Q. Will you please make search for it?

A. I am now making search.

Q. Wait a moment. Will you please make search for it and produce it, if possible, at the next hearing?

A. Yes, sir.

Mr. DAVIS: I reserve the right to examine this witness further on this subject after learning of the result of the search indicated.

Owing to the omission of the examiner to summon a wit-
129 ness whose name was given him this morning by counsel for the defendant, there was no other witness present to be examined.

Adjourned until tomorrow, the 14th instant, at 3:30 p. m.

WASHINGTON, D. C., *March 14th*, 1894.

Met pursuant to adjournment.
Present as before.

Whereupon LILIAN PIKE, a witness produced on the part and behalf of the defendant, being first duly sworn, deposes and says:

By Mr. DAVIS:

Q. What is your name?
A. Lilian Pike.
Q. You are a daughter of the late General Albert Pike?
A. Yes, sir.
Q. You reside in Washington?
A. Yes, sir.
Q. How long have you lived here, all your life?
A. Oh, no; about twenty years.
Q. Do you know the parties to this cause, Judge Willoughby and Mr. Mackall?
A. Yes, sir.
Q. How long have you known Mr. Mackall?
A. About 16 years.
Q. Did you ever do any work for Mr. Mackall in the way of copying papers and the like?
A. Yes, sir; copied nearly all of his papers for about fourteen years, anyhow.
130 Q. I wish you would look at the paper I now show you and state in whose handwriting that is, if you know. (The paper handed witness is the original agreement of April 10th, 1883, put in evidence during the deposition of the complainant and as part thereof.)
A. It is my handwriting.
Q. Do you remember the circumstances under which you wrote that paper?
A. I remember that Mr. Mackall brought the original agreement drawn up by Judge Willoughby and showed it to me and discussed it with me. He said he wanted me to make a copy of it. He said—shall I say what was said about it?
Q. Not immediately. As a result of that Mr. Mackall said to you or asked you did you prepare this paper?
A. Yes, sir.
Q. I wish you would look at the two papers I now show you (handing witness Complainant's Exhibits A & B). Do you remember having seen those papers before today?
A. No; I do not.
Q. Having those papers before you and having also this paper previously shown you, namely, the paper in your handwriting, are you able to say whether you made this copy, the original agreement, from the papers that are handed into your hands, Exhibits A and B, or from some paper in the handwriting of Judge Willoughby?

A. To the best of my recollection, I made it from the paper in Judge Willoughby's handwriting.

Q. Now, you started to say something that Mr. Mackall
131 stated to you at the time he asked you to make this copy. Was it in relation to making the copy?

A. No, sir; it was in relation to the agreement itself.

Q. What was Mr. Mackall's statement?

Mr. BIRNEY: Objected to as incompetent and as hearsay.

A. The statement was that Judge Willoughby was dissatisfied with the old agreement and wanted him to make this new one, and that he thought it was taking an unfair advantage of him; that he had promised him enough in the old agreement, and that Judge Willoughby had known what his condition was and what the property was; that he got nothing for it, and that it was very hard on him; that it was an excessive charge, and that he had first asked him or insisted upon his giving a portion—that is, a share—in the property; that he said he would not do that under any circumstances; that he would never do that for anybody; that it would be tying him up and preventing him from selling at the proper time and perhaps forcing him to sell at a time when it would be a great loss to him. He asked me what I thought about the $5,000, and I said, "How much have you paid Judge Willoughby?" and he told me—I do not now remember what it was—and I said, "Well, this $5,000; *are you* not to pay that right away, are you?" "No," he said; "that is contingent upon the success of this case that is coming on in court." He said, "That is the hard thing about it; he presses this upon me just as the case is going to be called, and I have no choice. I suppose I shall have to sign it, but I do it very unwillingly, and I think that after all that I have done for him it is especially unkind and ungenerous to press me in
132 this way." To the best of my recollection, that is what he said.

Q. Recurring for a moment to these two papers, Exhibits A and B, which are in Mr. Mackall's handwriting, with Judge Willoughby's interlineations and additions, I understand you that you have no recollection of having seen those papers before?

A. I do not remember.

Cross-examination.

By Mr. BIRNEY:

Q. Miss Pike, will you look at the interlineations and additions to these papers and say in whose handwriting they are?

A. (Examining.) They look like Judge Willoughby's handwriting.

Q. May it not be that you copied the paper which has been shown you in your handwriting from these papers with the additions and interlineations in Judge Willoughby's handwriting?

A. I have not the slightest recollection of ever copying any paper that was drawn up by Judge Willoughby in Mr. Mackall's

handwriting. Mr. Mackall never did make any copy except of the originals that were needed by the printer or court or counsel or somebody, and in that case Mr. Mackall would hurriedly make a copy for me to copy out, but I never have any recollection of ever doing that from Judge Willoughby's paper.

Q. One of these papers with these interlineations seems to be precisely the same in terms with your copying. Have you any explanation to give to that fact?

A. No, sir; I have not.

Q. That being the case, would that not be entirely consistent with your recollection of the paper from which you made your copy?

133 A. I do not see how it could be. Really I do not understand exactly what you want me to say.

Q. Does it conflict with your recollection that a part of the paper from which you made the copy was in Mr. Mackall's handwriting and part in Judge Willoughby's handwriting?

A. Yes, sir; it does, because my recollection is it was all in Judge Willoughby's handwriting.

Q. You say that in this conversation which you had with Mr. Mackall he said that after all he had done for Judge Willoughby it was especially unkind in him to ask for that contract. Did he tell you at that time what he had done for Judge Willoughby?

A. Yes, sir.

Q. What was it?

A. He told me of lawsuits and of a great many clients he had taken to Judge Willoughby to attend to their business.

Q. Did he mention any names of those clients?

A. He might have done so and he must have done so, but I would not remember it now.

Q. He had taken a great many of such persons to Judge Willoughby?

A. Yes, sir; he had taken a great many.

Q. And you cannot recall any of their names?

A. I think one of the cases was a turnpike suit, but that may be later. I do not remember now.

Q. Will you mention any of the others?

A. Well, there was some one from Alexandria, I think, had a case.

134 Q. Do you know who it was?

A. No; I have forgotten.

Q. But you are sure that he spoke of having taken a great deal of business and a great many clients at that time to Judge Willoughby?

A. Yes, sir.

Q. And that was his reason for thinking that Judge Willoughby at that time, under such conditions, should ask him to sign this agreement?

A. Not the only reason.

Q. What other reason?

A. The other reason was that Judge Willoughby knew what his

plans were, and that he knew that the property brought him in no return, that he had no income from it, and that he had a great deal of expense and no income from that property.

Q. How did he say that that made it hard for him?

A. Well, that would make it hard. What little money he would get from the case would have to go for the expenses and everything and would leave him very little.

Q. Did you understand that he was to make him then a payment?

A. After the case was tried; yes.

Q. Not until then, however?

A. Not until then.

Q. Will you explain what you mean by saying that it would be a burden upon him or hardship upon him because the property was yielding no income and he had to pay it?

A. Because everything would have to come out of that money that was to come from the case.

135 Q. That was the only hardship that he mentioned?

A. Well, he thought the charge was excessive. I do not know whether you would call that a hardship or not.

Q. Do you know how many days you had that paper?

A. No, sir.

Q. Had you had, before the time it was brought you for copying, any conversation with Mr. Mackall about it; and, if so, how many days prior?

A. I could not possibly remember that. I saw the paper before I copied it, and it was brought back to me. I think it was discussed and then brought back to me.

Q. The same paper?

A. I think so.

Q. Was it changed in any way?

A. Not to my recollection. I have no recollection of any change, but there might have been.

LILLIAN PIKE.

Subscribed and sworn to before me this 27th day of March, A. D. 1891.

ALEXANDER H. GALT,
Examiner in Chancery.

136 THOMAS E. YOUNG, a witness produced on the part and behalf of the defendant, being first duly sworn, deposes and says:

By Mr. DAVIS:

Q. What is your name?

A. Thomas E. Young.

Q. Where do you reside?

A. At 204 E St. N. W., in this city.

Q. How old are you?

A. I am in my sixty-second year.

Q. Do you know the parties to this cause, Judge Willoughby and Mr. Mackall?

A. I do.

Q. How long have you known Judge Willoughby?

A. I do not know. The first time I knew Judge Willoughby I was taken there by Mr. Mackall.

Q. In what connection?

A. In lawsuits.

Q. The Otterback suits, were they?

A. Yes, sir; connected with the Otterback cases.

Q. When you were taken to Judge Willoughby, in connection with the Otterback suits, what year was it?

A. It seems to me it was about 1883, the commencement of it; along about 1883.

Mr. DAVIS: I suppose the record will show.

137 The WITNESS: Some of it was done in Virginia.

Q. Have you any knowledge of an agreement that was made between Judge Willoughby and Mr. Mackall in April, 1883, about the compensation to be paid Judge Willoughby for services to Mr. Mackall?

A. I know there was an agreement; that is all I know.

Q. How do you know there was an agreement?

A. They both told me so.

Q. Do you remember a difference that Judge Willoughby and Mr. Mackall had in 1889, at the time when one of Mr. Mackall's suits was pending in the Supreme Court of the United States?

A. Very well.

Q. Now, in that connection, did you have any conversation with Judge Willoughby on the subject?

A. I did.

Q. In that conversation was or was not the agreement of April, 1883, mentioned?

A. It was.

Q. Did Judge Willoughby at any time say anything to you as to the meaning of the agreement of April, 1883, between him and Mr. Mackall; and, if so, what?

Mr. BIRNEY: Objected to as immaterial.

A. I do not exactly understand.

Q. Well, the agreement of April, 1883, that we are speaking of, is the agreement in relation to compensation in the Richards suits, the suits between Mr. Richards and Mr. Mackall, and the suits between Mr. Mackall and his brothers?

138 A. What I recollect about it is that Willoughby wanted to make him give him a deed for it.

Q. What, if anything, was said between you and Judge Willoughby on that occasion?

Mr. BIRNEY: Objected to.

A. I wanted Judge Willoughby to stop it.

Q. Did you offer him any reason?

Mr. BIRNEY: Objected to.

A. I told him it would kill him in business here.

Q. At the time was anything said by Judge Willoughby as to this agreement of 1883—what he was to get under it?

Mr. BIRNEY: Objected to as immaterial and as suggesting.

A. There was something about the $5,000 business. If he succeeded he was to get it, or something of that kind.

Q. With reference to that five-thousand-dollar business, what, if anything, did Judge Willoughby say was to be the case in the event he did not succeed?

Mr. BIRNEY: Objected to as leading and immaterial.

A. I do not think he was to get anything, as far as my recollection is concerned, if he did not get it.

Q. What I want to know is what that recollection is based upon. Was it based upon what Judge Willoughby told you or what Mr. Mackall told you, or what?

Mr. BIRNEY: Objected to.

A. Both were talking there together. I was there once when they were talking about it.

Q. Did you have any conversation with Judge Willoughby when Mr. Mackall was present?

A. Yes, sir.

139 Q. I want to know how far your recollection was based upon what Judge Willoughby told you when you and he were talking, if at all.

A. We talked about this case that was about to come up in the Supreme Court, and I told him I thought he had better stop it, because it would kill him as a lawyer here in this community, but he said no. He had consulted his wife, and he was going to stand firm.

Q. What I want to know is exactly as far as possible what Judge Willoughby said about getting the $5,000 if he succeeded.

Mr. BIRNEY: Objected to as leading.

A. That is what I recollect about it—getting the $5,000 if he succeeded.

Q. What, if anything, did he say directly as to his compensation in case he did not succeed?

Mr. BIRNEY: Objected to as leading.

A. I do not recollect.

Q. Did you have any conversation with Judge Willoughby about the matter after that time?

A. I think so. I would not be positive about it.

Q. Can you recollect anything that was said by Judge Willoughby to you in any conversation after that date?

A. I had a conversation there with him once in which he said Mackall was to have one-half of what business was brought to him.

Q. I mean about this agreement. Can you remember any conversation after 1889 about the corner building and the back rents from the property on 14th street and New York avenue?

Mr. BIRNEY: Objected to as incompetent and as leading.

140 A. There was some talk about it; I cannot remember.

Q. Can you recollect any conversation before the difficulty over the case in the Supreme Court?

A. Yes; there was some conversation, but I do not recollect what it was.

Q. When reference was made to getting the $5,000 in case of success, what, if any, case or cases was or were mentioned as those in which success was anticipated; what had it reference to?

A. I cannot recollect exactly what cases they were. I think there were some other cases beside that corner case—beside that Richards case.

Q. When you speak of the corner case, what do you mean?

A. That Richards got up there—14th and New York avenue.

Q. Were you familiar with Mr. Mackall's business at that time or not?

A. Yes; I was pretty familiar with what was going on.

Q. How did you become familiar it?

A. Being about the office.

Q. To what extent were you about the office?

A. I was there very often.

Q. To what extent, if you know, was Mr. Mackall there?

A. He did not do anything else but run around with Judge Willoughby.

Q. Did you or not ever know Mr. Mackall to be at Judge Willoughby's office during the Judge's absence?

A. No, sir; I never did.

THOS. E. YOUNG.

141 (No cross-examination.)

Subscribed and sworn to before me this 27th day of March, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

BROOKE MACKALL recalled for further direct examination.

By Mr. DAVIS:

Q. You have spoken of a former agreement—I mean one antedating the one of April 18, 1883—between you and Judge Willoughby on the subject of compensation. Did you succeed in finding that agreement?

A. I know where it is; I won't be able to produce it today. That was the one of 1880.

Q. Where is it?

A. In the hands of Mr. Hoehling. I have a memorandum here which I found today which explains what it is.

Q. The paper itself is in existence, is it not?

A. Yes, sir.

Q. Well, you cannot use the memorandum.

A. If I recollect aright, it was 25 per cent. of the mesne profits.

Mr. BIRNEY: I object to that.

Mr. DAVIS: That is not admissible.

Q. I wish you to look again at these papers marked Exhibit A and B, which are in your handwriting. I wish to call your attention especially to the fact that the percentage, namely, fifty,
112 is in the handwriting of Judge Willoughby, and written in what was evidently a blank left by you at the time of writing those papers; do you remember anything about leaving those blanks and why they were left?

A. (Examining.) My recollection is that Judge Willoughby drew up an agreement hurriedly and asked me to copy it, and then he added that the blanks were left; then he wrote the entire agreement out and that agreement I carried to Miss Pike to copy in duplicate.

Q. That is not the point of my inquiry. At the time you wrote those papers had the papers been agreed upon between you and Judge Willoughby?

A. No, sir.

Q. Now, I notice in those papers the expression "mesne profits." Did you at that time know what that expression meant?

A. No, sir; not until I saw it in the paper prepared by Judge Willoughby. I asked him what he meant; he said back rents.

Q. Have you asked Mr. Hoehling for the paper of 1880, to which you have referred?

A. I have, sir; I wrote him a note yesterday asking him to send it to me.

Q. Has he any other papers in his possession bearing upon this case that belong to you?

A. I do not recollect; I do not think he has.

Q. Did he deliver to you the paper?

A. No, sir.

Q. You have his letter, have you not?

113 A. Yes, sir.

(The letter referred to was handed to counsel for defendant.)

Q. Did you receive a reply from Mr. Hoehling?

A. I did, and that is the reply; I wrote him a letter and that is a copy of it.

Mr. DAVIS: I offer that paper in evidence.

The paper is marked Defendant's Exhibit No. 1.

Q. It appears by this letter that Mr. Hoehling retains that agreement under claim of an attorney's lien for services to you; what do you say as to that?

Mr. BIRNEY: I object to that as immaterial because the paper does not show what is assumed by the question.

A. I left the paper with him when I was unwell, after the suit in which the $12,000 judgment was given against me. He had nothing to do with getting up the paper or any claim upon it in any way. I have paid him more than I owe him. I owe him nothing. I believe he and Judge Willoughby have their heads together.

Mr. DAVIS: I desire to state upon the record that I have today personally seen Mr. Hoehling, who has stated to me that he has this paper in his possession and retains it under a claim of an attorney's lien, and I have notified him that I will summon him as a witness in relation thereto, and I therefore defer the further examination of this witness until the next session. Mr. Hoehling at the same time informed me that he has a number of Mr. Mackall's papers in his possession held under a similar claim, and it may
144 be that on their production there will be other matters upon which I may wish to interrogate the witness. There is also another matter upon which I reserve the right to examine the witness. There was in attendance today a witness with a record supposed to show Mr. Mackall's arrest on a warrant issued at the instance of Mr. Richards in relation to the possession of the part of lot 7, in square 223, about which we are inquiring, and it was my purpose to examine him and also Mr. Mackall in relation thereto, but after reporting here the witness discovered that he had brought the wrong record, and has promised to produce the desired record when notified, which *he* will be in time for the next session.

I wish, therefore, to reserve the right to examine Mr. Mackall in connection with that record.

Adjourned until Friday, March 16th, 1894, at 3.30 p. m.

WASHINGTON, D. C., *March 17th*, 1894—3.30 p. m.

Met pursuant to adjournment.

Present as before.

JOSEPH HARPER, a witness produced on the part and behalf of the defendant, being first duly sworn, deposes and says:

By Mr. DAVIS:

Q. Please state your name and occupation.

A. Joseph Harper; deputy clerk of the police court of the District of Columbia.

Q. How long have you held that position?

A. About thirteen years.

145 Q. Have you with you the docket of that court showing the prosecutions during the May term of 1882?

A. Yes, sir.

Q. Is this the book (indicating)?

A. Yes, sir.

Q. I wish you would look at the cases from No. 21036 in the margin and state what that docket shows.

A. (Referring to book.) This docket shows that on May 29th, 1882, Brooke Mackall was arraigned in the police court charged

with assault. Plea was not guilty; judgment, not guilty; defendant discharged.

Q. Who were the witnesses?

A. The witnesses for the United States were Alfred Richards and T. Davis, and for the defendant B. Mackall, S. S. Wilson, and H. Ashton and W. Perkins.

Q. Does that docket show who appeared, if any one, as attorney for the defendant?

A. Judge Willoughby.

Mr. DAVIS: I offer that matter in evidence.

Mr. BIRNEY: The record is objected to as immaterial and irrelevant.

Q. Look at the papers I now show you and state what they are.

A. (Examining.) One is a warrant for the arrest of Brooke Mackall, charged with assault to one Alfred Richards.

Q. Is that in the same case?

A. Yes, sir.

146 Q. And the other?

A. And the other is the information upon which he was tried.

Q. Is that in the same case?

A. Yes, sir.

Mr. DAVIS: I offer those papers in evidence and will file duly certified copies with the deposition of this witness.

Mr. BIRNEY: The papers are objected to on the grounds stated in the last objection.

(No cross-examination.)

JOSEPH HARPER.

Subscribed and sworn to before me this 31st day of March, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

WESTEL WILLOUGHBY, the complainant, recalled for the defendant.

By Mr. DAVIS:

Q. You have just heard the testimony of the witness Joseph Harper, have you?

A. I have.

Q. He stated that in the docket of the police court of this District, to which he referred, the name Willoughby appears as that of counsel for the defendant, Brooke Mackall, in the case to which he referred. Are you the person so indicated?

A. I am.

Q. (Handing witness a paper.) Please look at the paper now shown you and state if you recognize it.

147 A. I do.

Q. What is it?

A. It seems to be a bill filed by Alfred Richards and William B. Webb, trustees, against Brooke Mackall and myself, as trustee.

Q. In what case?

A. No. 8184.

Q. In equity, in the supreme court of the District of Columbia?

A. It is

Q. (Handing witness paper.) Look at the paper now shown you and state if you recognize that.

A. (Examining.) I do.

Q. What is that?

A. It seems to be a subpœna in that case.

Q. In whose handwriting is that paper?

A. I judge it is in the handwriting of Miss Pike, the body of it, and the signature is B. Mackall, Jr., the defendant.

Q. Who signed that paper as solicitor for the defendant?

A. I did.

Q. (Handing witness a paper.) Look at the paper now shown you and state if you recognize that.

A. It is an affidavit of Henry Ashton, George F. McElroy, and Samuel S. Wilson.

Q. Those are affidavits accompanying the answer in that case, are they not?

A. I should judge so.

Q. Will you please state in whose handwriting those affidavits are, the body of them?

A. Mine.

Q. Look at the paper now shown you and state what that is.

148 A. It seems to be my answer in the same case.

Q. And it is in your handwriting?

A. It is.

Q. Look at this paper now shown you and state if you recognize that and what it is.

A. It seems to be an order denying an injunction in that case.

Q. Denying the injunction and the appointment of a receiver?

A. Yes, sir.

Q. In whose handwriting is that?

A. It is mine, the body of it, signed by A. B. Hagner, justice.

Mr. DAVIS: I offer the papers recognized by the witness in evidence. As appears on their face, they are the original court papers in the case No. 8184, in equity, in the supreme court of the District of Columbia.

Mr. BIRNEY: Counsel for the complainant objects to each and all of the papers offered on the ground that they are immaterial and incompetent for any purpose.

Subject to the foregoing objection by counsel for the complainant, it is agreed by counsel for the complainant and defendant respectively that the said original papers may be read at the hearing hereof if admitted, and that duly certified copies of them may be

used in making up any record in this case which may hereafter become necessary.

Q. Do you remember the particulars of the case in which Mr. Mackall was tried for assault, which has heretofore been referred to?

A. Not very well. I remember it.

Q. Well, it was for an assault on Mr. Richards in connection with the claim of possession of part of lot 7, in square 223,
149 was it not?

A. I understand that Mr. Richards and some one in his employ, I believe, were there for the purpose of tearing down a fence which Mr. Mackall had put up, or interfering, at least, with the putting up of the fence—that is my recollection—or tearing it down, and that Mr. Mackall was charged with assaulting them for that reason.

Cross-examination.

By Mr. BIRNEY:

Q. Can you state the circumstances of the dismissal of the charge?

A. I do not know that I can certainly. It did not appear that any offence had been committed or even an assault, perhaps. I claimed, at least, that no assault had been made. There was violent talk, I believe. I urged the court, I know, to dismiss it and the court did.

W. WILLOUGHBY.

Subscribed and sworn to before me this 19th day of April, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

HENRY ASHTON, a witness produced on the part and behalf of the defendant, being first duly sworn, deposes and says:

By Mr. DAVIS:

Q. What is your name?

A. Henry Ashton.

Q. How old are you?

150 A. Sixty-five, I think.

Q. Do you know Mr. Brooke Mackall?

A. Yes, sir.

Q. How long have you known him?

A. I have known him over seventeen years.

Q. Are you familiar with Mr. Mackall's property on New York avenue and 14th street, in this city?

A. Yes, sir.

Q. Are you familiar with the Palace market, that stands on the corner there?

A. A little.

Q. Do you know anything about a difficulty that was had be-

tween Mr. Mackall and Mr. Richards about the possession of that property?

A. Yes, sir.

Q. Do you know anything about the fence that was there on New York avenue?

A. I do.

Q. I mean the fence that extends from the back of the Palace Market building on New York avenue?

A. It goes along the whole building, each side.

Q. Who put up the fence on the New York avenue side?

Mr. BRENEY: Objected to.

A. I put them up on both sides.

Q. For whom?

A. Mr. Mackall.

Q. When did you put up the fence on the New York avenue side, how long ago?

151 A. He called my attention some years before he knew the fence was put up, off and on, and I saw the men there all along until he made further arrangements about the fence.

Q. How far back can you remember doing work for Mr. Mackall about that fence, either the new one or the old one?

A. Between times—at different times—about two years or three years, more or less, off and on, the old fence.

Q. You were working on the old fence two or three years, but — want to get at is what year you first began working on that old fence.

A. I cannot tell; I cannot keep account of dates.

Q. Was it before or after Mr. Richards got that building?

A. The building was about closing then when Mr. Mackall called my attention.

Q. What do you mean by the building closing?

A. The carpenter's work.

Q. You mean they were just finishing the building?

A. Yes, sir.

Q. From that time down to the present what work have you done on that fence for Mr. Mackall?

A. The old fence?

Q. Yes; and the new one together.

A. The carpenter's work, putting down posts, and repairing the old fence when they had carriages and horses in there, and all other repairs in the yard.

Q. Do you remember some years ago when Mr. Mackall was arrested on the complaint of Mr. Richards for assaulting him?

152 A. Yes, sir.

Q. Were you present at the time of the supposed assault?

A. Yes, sir.

Q. What was it for; what was Mr. Mackall doing?

Mr. BRENEY: Objected to as irrelevant and immaterial.

A. Mr. Richards sent his man up there to object to my putting

up the fence. I asked the man what he was coming there for, and he said Mr. Richards saw me up there. He was there to cut the fence down such a distance from the ground, and I was on the scaffold, and I told him he had better not undertake it.

Q. Were you working there at the time?

A. Yes, sir.

Q. For whom?

A. Mr. Mackall, putting up the new fence.

Q. Did you work alone or was anybody with you?

A. The rest of the men that I had with me had gone to dinner.

Q. Did you have men there helping you with that work?

A. Yes, sir.

Q. How many?

A. About three.

Q. Was Mr. Mackall there at the time the *came* came up?

A. No, sir; he was not; nobody but myself.

Q. Did Mr. Richards himself come there?

A. He came there about two hours and a half, I think, in the evening after the time.

Q. After the time the man first came?

A. Yes, sir.

Q. Was Mr. Mackall there then?

A. No, sir; he came a little while afterwards.

153 Q. Was there any time that day when Mr. Mackall and Mr. Richards were there at the same time?

A. Mr. Richards did not come until late in the evening.

Q. What I want to get at is this: Was there any time that afternoon when both Mr. Richards and Mr. Mackall were there together?

A. Mr. Richards came there soon after Mr. Mackall did.

Q. Then Mr. Mackall had already come before Mr. Richards?

A. Mr. Mackall asked Mr. Richards what he was doing there, and he said he came to take charge of the fence, I think, and when he came into the yard he called to me for the hatchet. He said to them to get out of there, all of them—"God damn you, get out of this place."

Q. That is what Mr. Mackall said?

A. Yes, sir.

Q. Did they get out?

A. Yes, sir.

Q. At that time you were repairing this fence for Mr. Mackall?

A. Yes, sir.

Q. Were you doing anything else—you are talking about the New York avenue side?

A. Both sides.

Q. Where was it that Mr. Mackall went at Mr. Richards with the hatchet?

A. Mr. Mackall was in the yard and Mr. Richards came in soon after.

Q. Where did he come, on the 14th-street side?

A. Yes, sir.

Q. Where was Mr. Mackall; was he on the 14th-street side or the New York avenue side?

154 A. He was inside the enclosure—inside the yard.

Q. Where were you at work?

A. I was up on the scaffold.

Q. I want to know whether you were on the New York avenue side.

A. Yes, sir; on the New York avenue side; he called my attention to it.

Q. What was Mr. Mackall having done there at the time besides putting up the fence, if anything?

A. The fence was about all he had to do there, enclosing what he had inside the yard.

Cross-examination.

By Mr. Birney:

Q. When was that Palace Market building finished?

A. I could not tell the date.

Q. About how many years ago?

A. Almost fifteen years, quite fifteen years.

Q. Was it not 25 years?

A. No, sir; not 25 years.

Q. What year did you come to Washington?

A. I cannot tell that, either. I am not learned to answer that.

Q. Did you come here before the war or after the war?

A. I came here the third year.

Q. Of the war?

A. Yes, sir.

155 Q. How many years after the war was it, or after you came here, that that building was finished?

A. I could not state. I never kept a particular account, because I had no interest in it. I do not keep any account of anything but what is of interest to me.

Q. Did you have any interest in it more than fifteen years ago?

A. Well, I had interest in doing what I was employed to do; that was about all.

Q. More than fifteen years ago did you have anything to do with it?

A. A little longer than that about the fence.

Q. About how long ago was it?

A. Near twenty-two years. I think it is that much.

Q. The building was up there then, was it not?

A. Yes, sir.

Q. Was not the building finished about 1870?

A. I reckon so; yes, sir.

Q. When did you first begin to repair any fence on it—the time of this quarrel?

A. I was employed by Mr. Mackall in finishing the house. The old fence you are talking about?

Q. When did you first build a fence there for Mr. Mackall on

New York avenue? Was it before this time that this quarrel took place?

A. The old fence I kept in repairs until he got ready. I could not answer you about what year or how long it was.

Q. What old fence are you talking about?

A. The old fence that was there before I built the new fence.

156 Q. Where was it?

A. On 14th street and New York avenue, about the side of the brick building.

Q. Do you know what year you first repaired that?

A. No, sir.

Q. What did you do?

A. Put down posts and nailed the boards on rails there.

Q. You were doing that at the time of this quarrel between Mr. Richards and Mr. Mackall, were you not?

A. Yes, sir.

Q. Was there anything stored on that ground—anything piled on that ground inside—any coal or ashes—at that time?

A. There was a carpenter shop in there.

Q. Anything else?

A. And there was a horse and carriage in there at the time.

Q. Do you know to whom they belonged?

A. Who owned the carriage and horse?

Q. Yes.

A. Mr. Mackall had the horse and carriage, to my remembrance.

Q. Where was that—what part of the lot?

A. The 14th-street side.

Q. How far away from New York avenue was it on the 14th-street side; was it not down in the lower ground?

A. The stable was about the middle part of the grounds from the gate on the 14th-street side.

Q. The gate on the 14th-street side was how far below the building?

157 A. About half and half.

Q. About how many feet?

A. About near 100 feet.

Q. Near 100 feet south of the Palace Market building?

A. From the corner building down.

Q. Down to the end?

A. Yes, sir.

Q. Then the stable inside was even farther down—lower down in the lot than that?

A. Yes, sir; it runs right endwise up the lot from the end. It was a long building, and the edge of the building door was to the gate out in the street.

Q. Where was the carpenter shop?

A. It was down in the lowest corner, next to the dwelling-house, where the candy shop is—the corner of this lot.

Q. Well, the carpenter shop was way down in the southwest corner, was it not?

A. Yes, sir.

Q. As far away from New York avenue on the west side as you could put it?

A. Yes, sir.

his
HENRY x ASHTON.
mark.

Subscribed and sworn to before me this 10th day of April, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

158 Mr. DAVIS: I desire to state on the record that I have to-day asked Mr. Hoehling to appear at this session as a witness and to bring with him the agreement heretofore mentioned as being in his possession, and that he informed me that for the protection of his own interests he would prefer a formal summons, upon receiving which he would appear and take such course as he deemed proper. Owing to my engagements in court during the day I have been unable to procure Mr. Hoehling's attendance, and desire an adjournment until Monday next, March 19th, at 3:30 o'clock.

Counsel for the complainant here produces and tenders counsel for defendant for his use the document in the handwriting of the defendant, Brooke Mackall, Jr., supposed to be the duplicate of the paper which counsel desires to procure from Mr. Hoehling.

Whereupon counsel for the defendant proceeds with the further examination of the defendant, BROOKE MACKALL.

By Mr. DAVIS:

Q. (Handing witness paper.) Mr. Mackall, look at this paper, which has just been handed me by Mr. Birney, and state if you recognize it.

A. (After examining.) I do.

Q. In whose handwriting is it?

A. In mine.

Q. In whose handwriting are the signatures thereto?

A. Mine is the first one and Judge Willoughby's the second.

Q. Who prepared that paper?

159 A. Judge Willoughby.

Q. How does it happen to be in your handwriting?

A. I copied it.

Q. Is that or not a duplicate of the paper supposed to be in the possession of Mr. Hoehling?

A. I believe it is. This is what is known as the first agreement; this is the 1880 agreement, and the one that is sued on is the 1883.

Q. Now you say that that paper is in your handwriting and you copied it from a paper prepared by Judge Willoughby?

A. I did.

Q. Where did you write that paper?

A. Either at my room or at Judge Willoughby's office; I do not recollect.

Q. And why is it in your handwriting instead of the handwriting of Judge Willoughby?

A. Because he wrote carelessly, and he would hand it over to me and ask me to make two duplicates, which I would do and then he would execute it.

Mr. DAVIS: I offer that paper in evidence.

Mr. BIRNEY: I object to the paper as immaterial and irrelevant.

Subject to the foregoing objection, it is agreed between counsel that the paper may be copied into the body of the deposition of this witness, such copy to have the same force and effect as the original.

The paper referred to is as follows:

"This agreement made this eleventh day of December 1880 between Brooke Mackall, Jr., & Westel Willoughby witnesseth:

160 That whereas the said W. Willoughby has been for considerable period acting as counsel in the case of Richards and others *vs.* Brooke Mackall and others No. 2373 in equity in the supreme court of the District of Columbia for the defendants in said suit; and whereas he is also counsel for the plaintiff in the case of Leonard Mackall trustee of Brooke Mackall against Alfred Richards in ejectment No. 19635 at law in said court the beneficial interest in which is now claimed by the said Brooke Mackall Jr.,

And whereas a controversy has been threatened concerning the validity of the will of Brooke Mackall lately deceased and the said Brooke Mackall, Jr. claims the real estate and other property of which his father died seized under a conveyance from his father of February 27th 1880 the validity of which is threatened by the alleged division of said will, in which matters said W. Willoughby has been acting as counsel.

Now therefore in consideration of the services of said W. Willoughby as such counsel performed and to be performed, he hereby agreeing to conduct the said controversies to a final termination to the best of his ability as such counsel the said Brooke Mackall Jr., hereby agrees to allow to him as compensation for such services in addition to what has already been received by him a sum equal to twenty-five per cent. of such sum as may be adjudged to the said Leonard Mackall trustee as aforesaid or which may be recovered in said ejectment suit by way of mesne profits and costs and the said W. Willoughby shall have a lien therefore upon said judgment, as

161 may be recovered against said Alfred Richards and that the above compensation shall be received by said W. Willoughby in full satisfaction for his services in aforesaid matters in controversy as counsel he to have no other compensation for such services.

Witness the following signatures and seals.

B. MACKALL, JR. [SEAL.]
W. WILLOUGHBY. [SEAL.]"

Q. Have you succeeded in finding the original memorandum which you say was given you by Judge Willoughby about the 1st of April, 1883, which afterwards culminated in the agreement of April 10th, 1883?

A. I have not yet been able to find it. It may be among the papers that I gave to Mr. Hoehling to take charge of for me.

Mr. DAVIS: This presents now the same difficulty about Mr. Hoehling, and I wish to reserve the right to examine this witness further upon the subject of that agreement after the question of Mr. Hoehling's possession and delivery up of possession of the paper referred to shall have been determined.

(No cross-examination.)

Adjourned until 3:30 o'clock p. m. Monday, March 19th, 1894, and the examiner is requested to cause Mr. Hoehling to be summoned to appear at that time with all papers now in his possession belonging to the defendant, Brooke Mackall.

162 In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
against
BROOKE MACKALL, Defendant. } Equity. No. 12521.

WASHINGTON, D. C., *March 23rd*, 1894.

Met pursuant to notice.

Appearances: A. A. Birney, Esquire, in behalf of the complainant; Henry E. Davis, Esquire, in behalf of the defendant.

THOMAS E. YOUNG recalled.

By Mr. DAVIS:

Q. Mr. Young, on looking over your testimony as reported I find the following questions and answers:

"Q. At that time was anything said by Judge Willoughby as to this agreement of 1883—what he was to get under it?

A. There was something about the $5,000 business; if he succeeded he was to get it, or something of that kind.

Q. With reference to that $5,000 business what, if anything, did Judge Willoughby say was to be the case in the event he did not succeed?

A. I do not think he was to get anything, as far as my recollection is concerned, if he did not get it."

And later the following questions and answers:

"Q. What I want to know is exactly, as far as possible,
163 what Judge Willoughby said about getting the $5,000 if he succeeded.

A. That is what I recollect about it—getting the $5,000 if he succeeded.

Q. What, if anything, did he say directly as to his compensation in case he did not succeed?

A. I do not recollect."

I wish to call your attention to an apparent inconsistency in these answers. In one you say, "I do not think he was to get anything, as far as my recollection is concerned, if he did not get it," and in the other you say, speaking of his compensation in case he did not succeed, "I do not recollect."

A. I did not understand the question then.

Q. Now, what is the fact about that, according to your recollection, as to his getting this $5,000 compensation?

A. To get $5,000 if he gained the back rents and the corner; if he did not he was to get nothing.

Cross-examination.

By Mr. BIRNEY:

Q. Have you been talking with Mr. Mackall about your testimony since you gave it the other day?

A. No, sir.

Q. Didn't he call your attention to this testimony which you have given?

A. Mr. Davis called my attention to it the other day.

Q. Since your testimony was given?

A. Yes, sir.

Q. Have you had any talk with Mr. Mackall about it?

A. No, sir; I have not.

164 Q. Can you recollect all that was said on that occasion by Judge Willoughby?

A. I can recollect a good deal of it.

Q. Can you recollect it all?

A. I recollect a good deal that I did not state.

Q. I simply ask if you can recollect all that was said. That is all I want to know.

A. I think I can. I am pretty sure I can.

Q. Have you had pretty severe litigation with Judge Willoughby yourself?

A. Well, that is what brought on the litigation with Judge Willoughby.

Q. Have you had severe litigation with Judge Willoughby?

A. I say that is what brought it on.

Q. You do not quite answer my question. Have you had severe litigation with Judge Willoughby?

A. I have not, but my wife has.

Q. You have had no litigation with Judge Willoughby?

A. My wife has.

Q. Have you?

A. No, sir.

Q. Was Mr. Mackall a witness in that suit in behalf of your wife?

A. I think he was.

Q. Have you said recently to Mr. Columbus Alexander that you could not know anything about this case unless Mr. Mackall paid you what he owed you?

165 A. No, sir; I did not.

Q. Did you not have any conversation with Mr. Alexander on the subject?

The WITNESS: Of this case?

Q. Yes; about being called as a witness in this case.

A. No, sir; none in the world. It never was mentioned to me until Mr. Davis mentioned it to me.

Q. Was Mr. Mackall a witness in behalf of your wife in that suit?

A. That is my recollection.

Q. Where did the conversation with Judge Willoughby concerning the agreement with Mr. Mackall take place?

A. In his office.

Q. How many such conversations were there?

A. I think there were three.

Q. At what intervals of time did they occur?

A. They might have been a day or two days apart.

Q. How many times did he repeat this statement to which you have testified?

A. Twice.

Q. Did he say anything about it at the third interview?

A. He said it at the last two interviews, but he did not say it at the first.

Q. When was the first as nearly as you can fix it?

A. It was about the time that this thing came up in the Supreme Court.

Q. Was it before or after the argument in the Supreme Court?

A. Before the argument.

Q. How long before?

166 A. I think about between a week and ten days.

Q. Do you mean the supreme court of the District of Columbia or the Supreme Court of the United States?

A. The United States Supreme Court.

Q. Was it before or after Mr. Mackall and Judge Willoughby had had their break?

A. It was after that.

Q. You were endeavoring to bring them together. You were acting as a peacemaker, were you not?

A. I was trying to save Judge Willoughby's character; that was what I was trying to save.

Q. Well, you were acting as a peacemaker between them, were you not?

A. Yes, sir.

Q. What brought up this conversation?

A. With Mr. Willoughby?

Q. Yes.

A. I was there on some business, and he told me about it. I told him I thought he was doing wrong, and that it would not look very well in a business community.

Q. What did he say?

A. I said what he said.

Q. What was the first thing he stated to you after you told him it looked wrong?

A. He said he had consulted his wife and was going to stand firm, for Brooke Mackall would sell the property and put the money in his pocket and would laugh at him.

Q. What did you say?

167 A. I said, "This is a curious way of doing business after Brooke Mackall has been working as long as he has to bring trade to you."

Q. What did he say?

A. He said he did not care; he was going to stand firm; that no lawyer would take that case; no lawyer dare touch it.

Q. Then what followed?

A. I left. I could not spend the whole time there.

Q. Was there anything more than that in substance? Was not that the substance of the whole interview?

A. The substance of the whole interview was——

Q. What you have stated?

A. Yes, sir; I think it was.

Q. You saw him next about two days afterwards?

A. About two days after.

Q. What conversation did you have with him then?

A. About the same thing over again.

Q. Was there anything more at that conversation than there was at the first?

A. The second conversation, yes. I asked him about this $5,000 and about promising to pay Brooke Mackall half of what he brought to him.

Q. Have you seen Mr. Mackall after the first interview and before the second?

A. I do not think I had.

Q. Then, who opened the conversation at this second interview?

A. I did.

Q. What did you say to Judge Willoughby?

168 A. I told you what I said to him. I told him he had better change his mind. I told you what he said.

Q. And what did he respond to that?

A. He said the same thing over again. He had consulted his wife, and he was going to stand firm, for Brooke Mackall would sell the property and put the money in his pocket and laugh at him.

Q. What further did you say to that?

A. That I did not think he would do such a thing. He said, "Well, I have no confidence in him at all. He would do anything." I said, "This is a nice business that you fellows have been carrying on." I thought I was in a nice box.

Q. What did Judge Willoughby say?

A. That was all he said—he was going to stand firm; that no lawyer dare take it.

Q. You were talking about the difficulty in the Supreme Court, were you?

A. I told him he ought not to take a deed from a man on the eve of trial. I said it would not look well in a business community.

Q. That was the subject of the talk, his demand for a deed of conveyance of an interest in the property?

A. We went all over the things that happened about that fuss with Mackall.

Q. Was there anything more?

A. I stated pretty much all connected with that case.

Q. I am asking you now to restate as fully as you can the conversation at that interview.

A. That was what it was. Just what I have stated.

169 Q. Then you have given it to me practically in full, as you remember it?

A. Yes, sir.

Q. At the third interview you say nothing was said. Which was it, the first, second, or third, that this $5,000 was talked about?

A. The second and third they talked about the $5,000 with the other part and the one-half he was to pay Brooke Mackall for bringing trade to him.

Q. What brought it up at the second interview; if you say the $5,000 was talked about, what brought up the subject?

A. Willoughby mentioned it himself.

Q. What did you understand his demand on Mackall at that time to be?

A. A deed or he would not argue the case.

Q. A deed of conveyance of part of the property?

A. I think it was part.

Q. A certain proportionate part—such a percentage?

A. Yes, sir; it would tie him up in some shape or form, I forget.

Q. What had that to do with the payment of the $5,000?

A. It had nothing to do with the payment of the $5,000.

Q. What was it that called up between you the question of the payment of the $5,000?

A. I asked him about that.

Q. How did you know it?

A. I was in there all the time, backwards and forwards, and heard everything that went on.

170 Q. Did you ever hear that discussed between them?

A. Of course I had.

Q. Between whom?

A. Between Mackall and Willoughby.

Q. How long before?

A. A year, I reckon; I cannot put the dates down.

Q. Judge Willoughby brought it up?

A. To me he did.

Q. What did he say when he brought it up?

A. I told you what he said.

Q. Won't you repeat it?

A. Judge Willoughby said he was to get $5,000 if he gained possession of that corner and the back rents; that Brooke Mackall

could well afford to pay him, because it was like that much money found.

Q. Did he say anything more than that?

A. That was all on that subject.

Q. Was there any conversation at the third interview about this $5,000?

A. Both the second and third.

Q. What was the conversation at the third?

A. It was just the same thing over again.

Q. Nothing more than that?

A. No, sir.

Q. That he was to get $5,000 if he succeeded in getting the rents, and that Brooke Mackall could well afford to pay him?

A. Get the rents and possession of the property at the corner.

Q. You understood in that conversation that he was talk-
171 ing all the time about the case in the Supreme Court of the United States?

A. No; I did not understand it that way. There were two separate cases. What brings it to my memory now about the $5,000 was when I was talking to him about this Supreme Court business. Said I, "If you abandon this case, how are you going to gain the corner and get the back rents?"

Redirect examination.

By Mr. DAVIS:

Q. You have spoken of the conversation which you say took place between you and me after you were put on the stand?

A. No; I did not say anything of the kind.

Q. One moment. You did say a moment ago in response to a question of Mr. Birney's, when he asked you if Mr. Mackall had talked to you about your testimony. No, but that I had talked to you. Did I have any conversation with you before I put you on the stand?

A. Today? No, sir.

Q. Not today; I mean before you were first examined in this case; how did you happen to be a witness in this case?

A. You met me one day and asked me something about it.

Q. I asked you, did I not, in what way you would testify?

A. Yes, sir.

Q. And you told me?

A. Yes, sir.

Q. And I called you as a witness?

A. Yes, sir; by subpœna; that is the first I knew anything about it.

172 Q. You told me what you would testify to if you were subpœnaed?

A. Yes, sir.

Q. You just now said to Mr. Birney that all that Judge Willoughby said about the $5,000 was that he was to get $5,000 in case he succeeded?

A. Yes, sir.

Q. What, if anything, did he say he was to get in case he did not succeed?

Mr. BIRNEY: Objected to as leading and improper in redirect.

A. He was not to get anything.

Q. I omitted to ask you one thing: Were you at any time on Mr. Mackall's bond for any purpose?

A. I was.

Q. For what purpose?

A. In appeals to different courts.

Q. At the time you had these conversations with Judge Willoughby what, if anything, was said in relation to your being on his bond?

Mr. BIRNEY: Objected to as immaterial.

A. He said I ought to see him paid, because I was on his bond; that Brooke Mackall would rob me. That is what he said.

THOMAS E. YOUNG.

Subscribed and sworn to before me this 27th day of March, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

173 WASHINGTON, D. C., *March 27th*, 1894.

Upon reading over his deposition to the witness Thomas E. Young he desired to make the following correction therein. At the top of page 77, in answer to the first question on said page, the witness desires to substitute for his answer as reported the following:

A. No; I did not understand it that way. There were two separate cases. It referred to the back rents and occupation, as far as I can recollect, of the property on 14th street. I recollect that the corner was decided before that. What I alluded to was the case in the Supreme Court of the United States, which was dismissed because of the failure to print the record. I said to Judge Willoughby, "How are you going to attend to that case when you abandon Mackall and he will have nothing further to do with you?"

THOMAS E. YOUNG.

Subscribed and sworn to before me this 17th day of March, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

BROOKE MACKALL (the defendant) recalled.

By Mr. DAVIS:

Q. It has developed in the testimony here that you were arrested on the complaint of Mr. Richards. Do you remember that occurrence?

A. I do, sir.

174 Q. What was the occasion of it?

Mr. BIRNEY: Objected to.

A. I was on the property on the corner of 14th street and New York avenue, standing near the front on New York avenue——

Q. I do not care about the details. All I want to know is, what was the occasion of the alleged assault by you?

A. Well, I was there superintending the erection of that fence on New York avenue and 14th street, the high enclosure that is there now, and when I arrived there that day I was told that a man was waiting out there who had been sent there by Mr. Richards to cut that fence in two on New York avenue. I inquired who the man was, saw him, and told him not to dare to put his hand on that fence. I explained the matter to him, and he said he would wait until Mr. Richards came. When Mr. Richards came he and Mr. Richards had a talk, and then they came on the property together. Mr. Richards advanced towards me. I was then near the fence on New York avenue, on the inside, and he wanted to know what I had to do there. He was very threatening in his manner, and this man was right behind me, a large, powerful fellow. I said, "You have been annoying me for years about this property; now, sir, you get out of here." I called to my man, Henry Ashton, who had charge of the erection of the fence, to give me his hatchet, and I drove Mr. Richards out with that hatchet. I was afterwards arrested for doing that and taken to the police court—or rather I appeared there. The case was heard and dismissed—or rather the charge against me was dismissed.

Q. What was Mr. Richards attempting to do?

A. He was attempting to take possession and to cut off one-
175 half of the tall enclosure and to drive me from the possession that I had had for many, many long years.

Cross-examination.

By Mr. BIRNEY:

Q. As I understand your testimony, Mr. Richards was at that time in possession under enclosure of a part of the land which is now in question; is that right?

A. Mr. Richards had taken possession of a small piece of ground immediately south of the Palace Market building and had erected a fence and occupied 867 square feet by actual measurement. He had possession of that and the building and no more.

Q. That piece, the 867 square feet, is a part of the premises now in question, is it not?

A. I do not know what you mean by the premises now in question. It was a part of the property that he claimed under his marshal's deed.

Q. And after the decision in the Supreme Court of the United States, construing his marshal's deed to affect only the piece of

ground occupied by the Palace Market building, he gave up the possession, did he not, of this 867 square feet?

A. He did not, sir. Only recently I took possession.

Q. When did you take possession?

A. A short time ago.

Q. What do you mean by that?

A. H. G. A. I mean that I ordered my man to tear down the fence and told the lady to take out her flowers.

176 Q. How long ago was that?

A. Not long ago.

Q. How long ago?

A. A few months ago.

Q. How many months ago?

A. I cannot tell exactly. If it becomes material I can show the exact time.

Q. It is material, and I wish you to show the exact time.

A. Or as near as I can get to it—about the time?

Q. How near can you get to it now by recollection?

A. Within a few months.

Q. What do you mean by a few months?

A. I mean that it was of recent date that it was taken.

Q. Is it two months, six months, or a year?

A. It might be a year and it might be within six months and it might be between the two. I do not know exactly just now; a short time, though.

Q. Might it not be two years?

A. I do not think so.

Q. Will you say it is not as long as two years?

A. I will not.

Q. Will you say it is not as long as three years?

A. Yes; I will positively say that.

Q. It may be more than two years and less than three?

A. I do not say that. I do not propose to be caught. I want the truth and nothing but the truth. Hickory won't win with me.

Q. How did that fence run; what were the lines of the enclosure of this 867 feet?

177 A. It runs, as the fellow said, sort of as the deed called for; but it did not run as it ought to have run under the deed. It pretended to run 44 feet from 14th street, not quite to the end of the building—that is, counting the building and the fence. I could give it if it were necessary, the exact diagram of it that was taken at the time, if I can find it.

Q. Do you mean that the south fence of that parcel commenced at a point on 14th street 44 feet south of the extreme northeast corner of the lot and extended westward parallel with New York avenue?

A. I mean to say that the fence commenced a little distance from 14th street on a line with the building, as claimed to be under the marshal's deed, and ran about 44 feet in width, counting the building on New York avenue. It did not run quite to the end of the building on the west side; it was a rough board fence.

Q. That south fence was on a line 11 feet from New York avenue, was it not, and parallel with New York avenue?

A. I cannot state that positively; it looked something like that; it came pretty near covering the ground that the deed called for, but not exactly.

Q. And extended practically from 11th street to a north and south line almost on the west line of the Palace Market building?

A. No, not almost; it was some distance.

Q. Well, how far?

A. Not a great way, but some distance; it did not reach the west end of the building.

178 Q. How far short did it fall?

A. I cannot tell; maybe a foot; two feet or thereabouts.

Q. Was it over a foot?

A. I think so.

BROOKE MACKALL.

Subscribed and sworn to before me this 16 day of March, A. D. 1894.

ALEXANDER H. GALT,
Examiner in Chancery.

Counsel for the defendant here announced his case-in-chief closed.

DISTRICT OF COLUMBIA, *ss:*

I, Alexander H. Galt, examiner in chancery, do hereby certify that in pursuance of notice the foregoing depositions were taken down by me in the presence of and from the statement of witnesses at the time and place designated in the caption hereof and were reduced to writing and by me read over to the witnesses and by them subscribed in my presence, the witnesses being by me duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties in said cause or in any manner interested therein.

ALEXANDER H. GALT,
Examiner in Chancery.

179 Copy.

EXHIBIT D.

Filed June 13, 1890.

1416 N St. N. W., WASHINGTON, D. C., *December 6th*, 1889.

Judge W. Willoughby.

DR SIR: In order that there may be no misunderstanding as to my willingness to carry out in good faith the agreement in writing of April 10th, 1883, between us as to your compensation for services as my counsel in the case of Leonard Mackall *et als. vs.* Brooke Mackall, Jr., *et als.*, No. 8038, in equity, in the supreme court of the

District of Columbia and which is now pending in the Supreme Court of the United States, being No. 159 on the present docket of said court and will be reached for trial within the next ten days, I write this letter.

Said agreement contains substantially the following clause: It is provided further that if said cause No. 8038 is not finally determined by the court sitting in special term and an appeal is taken for such services as may be necessary in appellate courts an additional compensation shall be allowed, which shall hereafter be agreed upon by the parties.

Some time ago you proposed to me that I ought to agree to divide equally between us my property in event of success. You lately proposed substantially the same thing, both of which offers I positively refused to consider, and now you say you want twenty-
180 five per cent. of what I may have left in case of success. This I also declined to consider, and then you said you were entitled to $25,000 in 8038, but that you would take $10,000, and I understood you to say in substance that if I did not agree to that you would decline to do anything further in the case. It is very evident from what you said at our last interview that you were not going to stand by the agreement of April 10th, 1883, above referred to, and that you wanted to be paid for all your past services and expected me to pay you for all future services for cases now pending. Even at this view of the matter your demands were not only grossly excessive, but in violation of said written agreement. Now you demand $10,000 for your services in said cause before the general term of the supreme court of the District of Columbia and before the Supreme Court of the United States.

I consider $10,000 not only more than I can afford to pay, but very excessive. I am willing to agree in writing to give you $500 for your services before the general term and also $500 more for your services before the Supreme Court of the United States in said cause of L. Mackall *et als. vs.* B. Mackall, Jr., *et als.*, No. 8038, in equity, and being No. 159 on present docket of said Supreme Court of the United States, provided you are successful and that you conduct the said cause to the best of your ability.

The amount I am willing to agree to give you is an amount as large if not larger than any distinguished lawyer of national reputation would think of asking and much more than a jury of honest men would award you.

181 I must request you to inform me in writing without delay whether I understood you correctly that unless I acceded to your demand of agreeing in writing to give you the sum of $10,000 for your services in said cause No. 8038 that you would abandon my said case now pending and on the eve of hearing before the Supreme Court of the United States, I am greatly surprised at your excessive demands in view of the written agreement of the said 10th day of April, 1883, and especially on the eve of trial.

If you abandon my said cause now because I will not consent to pay you so unreasonable a sum for your services before the general term and those future services before the Supreme Court of the

United States in said case, I will be compelled at once to employ counsel to take charge of my said cause and hold you responsible for breach of contract and all damages that may result therefrom.

I regret exceedingly that after so many long years of pleasant relations you have seen fit to act as you have towards me in this matter and at this particular time.

I have shown my friendship for you in the most substantial way by sending to you clients that have and will pay you many thousands of dollars; have been your friend in various ways. I have never made the least complaint to you or to others of your losing so many of my cases, and have paid you liberally for the case you won for me and entered into agreements with you to pay a handsome contingent fee if successful in other cases in which you failed. You lost your time and I my property, rents, heavy costs for printing, &c., &c., & also my time. You never had a client who
182 could and did assist you in his matters as I have done, and in many other cases, not my individual ones, and now it seems I am not to receive apparently any gratitude for such services, but would, if I permitted it, be made to pay the most unfair and extravagant sum for services on the score of services rendered each other. I feel that any fair-minded and intelligent person would say that if a balance was struck between us you would be greatly indebted to me.

You have named your figure, which I will not agree to, because it is excessive and unjust. I have named mine, as I have indicated. I desire a fair, square, and immediate answer whether you agree to my figures, which I am willing immediately to put in formal shape, and unless I receive an answer, in writing only,
S. H. W. by 10 o'clock tomorrow morning, I shall so act as to preserve my interests at this critical moment.

Very respectfully, B. MACKALL.

WASHINGTON, D. C., *December 6th*, 1889.

I hereby certify that I have this day served the original, of which this is a true copy, on W. Willoughby, Esq., at his office, 458 La. avenue N. W., at 2:35 o'clock p. m.

S. H. WALKER.

183 EXHIBIT "B."

Filed June 13, 1890.

W. Willoughby, attorney and counsellor at law; office, Walker building, = 458 Louisiana avenue.

WASHINGTON, D. C., *Dec.* 7, 1889.

Mr. Brooke Mackall.

DEAR SIR: Your letter of yesterday precluded the idea of further discussion.

Your case is on the assignment for Monday next and will then be called, and according to the rule the briefs should then be filed.

The briefs already on file are under my control. I hand you herewith papers to be executed by you. If it is delivered to me properly executed and acknowledged before eleven o'clock a. m. on Monday next, I will then file the briefs, hand you for printing briefs in reply, which I consider indispensable, and present the case to the best of my ability; otherwise not.

You had brought about this condition of things yourself. I do not propose to leave my claim to depend upon a lawsuit with you. I have the power to protect myself and shall exercise it. This is final.

Yours truly, W. WILLOUGHBY.

184 *Original Bill.*

Filed May 2, 1887.

In the Supreme Court of the District of Columbia. In Equity.

Between—

ALFRED RICHARDS and THOMAS A. RICHARDS, Thomas Wilson, J. D. Parkinson, Francis Wheatley, D. Hannan, The Washington Gas Light Company, Henrietta P. Pepper, and Patrick O'Hare, Complainants.

and

BROOKE MACKALL, BROOKE MACKALL, JR., William W. Corcoran, J. M. H. Hollingsworth, Virginia Hollingsworth, Julia A. Nichols, Margaret Reintzel, Roberta Hanerwinckel, William Hanerwinckel, Emily De Voss, Jacques De Voss, Martha Bolling, George Bolling, Mary Doughty, Fanny A. Doughty, Julia Albert, James Albert, and Susan Doughty, Defendants. } Docket No. 11.

To the honorable the judges of the supreme court of the District of Columbia, holding a special term of said court:

The complainant- respectfully represent—

1. That the complainants Alfred Richards and Thomas A. Richards are citizens of the District of Columbia and residents of
185 the city of Washington and are doing business in said city under the name and firm of A. and T. A. Richards. Thomas Wilson is also a citizen of the said District and a resident of said city, and was one of the firm of Corwin, Owen and Wilson, now dissolved; that the other complainants are also citizens of said District, and that all of the said complainants are the holders of judgments against the said defendant, Brooke Mackall, Jr., and bring this suit in their own behalf and for the benefit of all others creditors of the said Brooke Mackall, Junior, who will become parties to and share the costs and expenses attending their proceedings.

2. That the defendants Brooke Mackall and Brooke Mackall, Junior, William W. Corcoran, J. M. H. Hollingsworth, Virginia

Hollingsworth, Julia A. Nichols, Margaret Reintzell, Mary Doughty, Fanny A. Doughty, and Susan Doughty are citizens of the District of Columbia aforesaid and reside therein; that Roberta Hanerwincked and William Hanerwincked reside in Richmond, in the State of Virginia; George Bolling and Martha Bolling reside in Pittsburg, in said State of Virginia; James Albert and Julia Albert reside in Baltimore, in the State of Maryland, and that Jacques de Voss and Emily de Voss reside in Berlin, in Prussia.

3. That on or about the first of October, 1867, the complainants, Alfred and Thomas A. Richards, by their firm name of A. and T. A. Richards, on the law side of this honorable court, received judgments against the defendants Brooke Mackall, Junior, as maker, and Brooke Mackall, as endorser, of a certain promissory note for the sum of $897.42, with interest and costs, with a condition attached
186 to such judgments that there should be a stay of execution on such judgments until the first of March, 1868; that afterwards and after the period of the said stay of execution had elapsed said complainants proceeded to enforce their said judgments by having recourse to certain real estate belonging to the said Brooke Mackall, Junior, situated in the said city of Washington, and that accordingly, under and by virtue of certain writs of execution issued upon such judgments and certain other judgments prior in date to them recovered by your complainants as aforesaid, the marshal of the District of Columbia took and sold a certain parcel of real estate lying and being in the said city and contained within the courses and distances following—that is to say, part of lot numbered seven (7), in square numbered two hundred and twenty-three (223), beginning at the northeast corner of said square and running thence south forty-four (44) feet; thence westerly to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; then with said north line to the place of beginning, to Alfred Richards for the sum of two thousand five hundred dollars, and conveyed the same to said Richards by deed bearing date the 7 of October, 1870, now recorded among the land records of Washington county, in the District of Columbia, in Liber No. 639, one of said records, as will more particularly appear upon inspection of said record; that after paying out of the said sum so realized from the sale of the said piece of property the said judgments so as aforesaid prior in date to the said judgments of the complainants A. and T. A. Richards, there remained in the hands
187 of the marshal aforesaid the sum of $646.89, applicable to the judgments so as aforesaid recovered by the said complainants, A. and T. A. Richards, as will more fully and at large appear from a copy of the account or statement made by the said marshal of the said sale and the said judgments, filed herewith and marked Exhibit "A;" that after the application of the sum so remaining in the hands of the marshal to the said judgments of the complainants A. and T. A. Richards there remained a large balance due and payable on the said judgments, as will appear from a short copy of said judgments, hereto annexed and marked "Exhibit B," and that the said balance still remains unpaid.

IV. That on or about the 6th of June, 1865, the complainant Francis Wheatley recovered on the law side of this court a judgment against the said Brooke Mackall, Junior, for the sum of $1,483.13, with interest and costs; that said judgment was founded upon proceedings instituted under the act of Congress making provision for the enforcement of mechanics' liens and the liens of materialmen, and is prior in date to the said judgments so as aforesaid recovered by the said complainants, A. and T. A. Richards, and no portion of the fund arising from the sale of the said part of lot 7, in square 223, so as aforesaid made under the execution issued to satisfy the judgments recovered by the said A. and T. A. Richards, was applied to the judgment of the said complainant, Francis Wheatley, because, as complainants are advised, the said Wheatley had not at the date of the said sale of said part of lot ordered an execution to issue for the enforcement of said judgment, or because such execution had not come into the hands of the said marshal of the
188 said District at the time of such sale; but complainants are advised that the judgment of the said complainant, Francis Wheatley, operates as a lien upon the said part of lot 7, in square 223, from its date; that a writ of *fieri facias* to enforce said judgment has been issued and is still outstanding unsatisfied, and that no part of the said judgment has been paid.

V. That on or about the 3rd day of April, 1868, W. H. Owen and Thomas Wilson, doing business under the name and firm of Cerwin, Owen and Wilson, recovered on the law side of the court against the said Brooke Mackall, Junior, a judgment for the sum of $300, with interest and costs, which said judgment was afterwards assigned to and entered to the use of the complainant Thomas Wilson; that a writ of *fieri facias* was issued upon the said judgment and placed in the hands of the marshal of the District of Columbia, who made a return of *nulla bona* thereon, and that said judgment remains still unsatisfied, no part thereof having been paid; all of which will more fully and at large appear from a short copy of said judgment hereunto annexed and marked "Exhibit C;" that on or about the 19th of November, 1868, the complainant T. Dunlin Parkinson recovered on the law side of this court a judgment against said Brooke Mackall, Junior, for the sum of $137.75, with interest and costs, and caused a writ of *fieri facias* to be issued therein, but that no part of said judgment has been paid; that on or about the 15th day of November, 1869, the complainant Daniel Hannan recovered on the law side of this court a judgment against
189 said defendant, Brooke Mackall, Junior, for $253.90, with interest and costs, and has caused a writ of *fieri facias* to be issued thereon, to which the marshal of the District of Columbia has made return of *nulla bona*, but no part of said judgment has been paid; that on or about the 5th day of January, 1870, the complainant Henrietta P. Pepper recovered on the law side of the court a judgment against the defendant Brooke Mackall, Junior, for the sum of $300, with interest and costs, and caused a writ of *fieri facias* to be issued thereon, but that no part of said judgment has been paid; that on or about the 28 day of February,

1870, the complainant The Washington Gas Light Company recovered a judgment against the said Brooke Mackall, Junior, on the law side of the court for $115.50, with interest and costs, and caused a writ of *fieri facias* to be issued thereon, to which the marshal of the said District has made return of *nulla bona*, and that no part of the said judgment has been paid; that on or about the 22d day of February, 1871, the complainant Patrick O'Hare recovered on the law side of this court a judgment against said defendant, Brooke Mackall, Jr., for the sum of 289.69, with interest and costs, no part of which said judgment has been paid; all of which will more fully and at large appear upon reference to the record of the said several judgments in this court, on the law side thereof.

6. That the said Brooke Mackall, Junior, is the owner of certain very valuable real estate in the city of Washington—that is to say, of all that part or portion of the parcel of ground known and designated upon the ground plat or plan of the said city of Washington as lot numbered seven (7), in square numbered two hundred and twenty-
190 three (223), remaining after taking or *carving* out therefrom the aforesaid piece or part thereof so as aforesaid taken, sold, and conveyed by the marshal of the District of Columbia to Alfred Richards to satisfy the judgment of the complainants Alfred and Thomas A. Richards, as far as the same would go after satisfying certain other judgments prior in date to the said judgments, as is hereinbefore set forth and contained (complainants annex to and make part of this their bill of complaint a plat of said lot, showing the portion thereof sold as aforesaid and the portion remaining unsold); that the said parcel of ground and premises ought to be made responsible for and subjected to the judgments of complainants hereinbefore particularly mentioned, but that, as complainants are advised, the said several judgments do not operate as liens upon the said parcel of ground because, as far as can be ascertained from the land records of county of Washington, in the District of Columbia, where such title should appear, the legal title to the said parcel of ground is not vested in the said Brooke Mackall, Junior, and that said parcel of ground cannot therefore, under the operation of the law controlling and governing such matters, be taken and sold under an execution to rates by said judgments.

7. That complainants are informed and believe and upon such information and belief aver and charge that the said Brooke Mackall, Junior, is the real owner of the aforesaid parcel of ground and premises, and that he keeps his title thereto off of the land records of Washington county, in the District of Columbia, for the purpose of defrauding complainants and hindering and de-
191 laying them in the recovery of their aforesaid judgments; that in certain proceedings instituted in this court on or about the 29th of June, 1869, by the said Brooke Mackall, Junior, against William B. Todd and the mayor, &c., of Washington city, the said Brooke Mackall, Junior, avers that he is the proprietor — lot numbered seven (7), in square numbered two hundred and twenty-three, and supports such averment by an oath, as will appear from the proceedings in cause No. 1763, equity docket 9, in

this court; that in certain other proceedings instituted in this court on or about the 15th day of September, 1869, by the said Brooke Mackall, Junior, against certain of complainants, among others, praying the court to restrain and enjoin the marshal of the District of Columbia from making sale of the part of said lot seven, in square two hundred and twenty-three (223), so as aforesaid sold to said Alfred Richards to satisfy the said judgments of said complainants, the said Brooke Mackall, Junior, alleges, and he supports the said allegation with an oath, that he is equitably entitled to the whole of said lot seven, in square two hundred and twenty-three, having received a parol gift thereof, but that the said property has never been conveyed to him, and that he has no legal title to any part thereof, as will appear from the proceedings in said cause in this court; that in point of fact complainants are informed and believe and, so believing, aver and charge that the said lot numbered seven, in square two hundred and twenty-three, was sold many years ago by William W. Corcoran and William S. Nichols, in whom the title was vested, to the said Brooke Mackall,

192 who paid the full purchase-money therefor and received a conveyance thereof in due form, and that afterwards the said Brooke Mackall sold or gave and conveyed the said lot seven to Brooke Mackall, Junior; that the said Brooke Mackall never placed the conveyance so as aforesaid made to him upon the land records of Washington county, in the District of Columbia, and that the said Brooke Mackall, Junior, has never placed the conveyance to him or any other evidence that the title of said lot has been transferred to him upon the said land records, and that the said Brooke Mackall and Brooke Mackall, Junior, conspiring and contriving to hinder, delay, and defraud complainants, have kept and still do keep the title to the said lot seven, in square two hundred and twenty-three, purposely concealed, and have hitherto kept and still do keep the said conveyances off the said land records, where the same ought to be spread, for the purpose of hindering and delaying said complainants in the recovery of their said judgments.

8. That since the sale and conveyance of the said lot seven, in square two hundred and twenty-three, to the said Brooke Mackall by William W. Corcoran and William S. Nichols in manner as aforesaid the said William S. Nichols has departed this life, and that the record title to said lot is now vested and standing in the said William W. Corcoran and the heirs-at-law of the said William S. Nichols, who are as follows: J. M. H. Hollingsworth and Virginia Hollingsworth, Julia A. Nichols, Margaret Rientzell, Roberta Hanerwinckel, Emily de Voss, Jacques de Voss, Martha Bolling, George Bolling, Mary Doughty, Fanny A. Doughty, Julia Albert, James Albert, and Susan Doughty, who are defendants to this bill.

193 9. That in the year 1862 the said lot seven, in square two hundred and twenty-three, was sold for taxes assessed thereon by the corporation of the said city of Washington, and was at such sale purchased by one Anthony Hyde, who afterwards transferred his said purchase to the defendant Brooke Mackall, Junior, to whom the said lot was conveyed in due form by the said corporate author-

ities of the said city of Washington by deed bearing date the 6th of October, 1865; that the said Brooke Mackall, Jr., has never placed this last-mentioned deed upon the land records of Washington, in the District of Columbia, but has kept the same off of said records for the purpose further of concealing his title to said lot and so delaying, hindering, and defrauding said complainants; that there has accumulated and is now due and unpaid a very large amount of taxes assessed upon the said lot seven, in square two hundred and twenty-three, for which the corporate authorities have advertised and are about to sell the said lot, as under the provisions of law in such case made and provided they have a right to do; that notwithstanding all these normal claims and incumbrances complainants are advised that the said lot of ground is of ample value to pay off and satisfy the several judgments so as aforesaid held by them, and that in good conscience they are entitled to have the decree of this court ordering that said lot shall be sold under the direction and by an officer of the court and the proceeds applied first to the payment of said incumbrances and next to the payment of the said judgments held by complainants.

Forasmuch, then, as complainants are without remedy in
194 the premises according to the strict rules of the American law and can only have relief in a court of equity, where matters of this nature are properly cognizable and *ciscable*—

To the end, therefore, that the said Brooke Mackall, Junior, and the rest of the defendants may full, true, direct, and perfect answers make to all and singular the matters and things hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated, and that particularly the said defendants, Brooke Mackall and Brooke Mackall, Junior, may discover, show, and make known to the court the condition of the title to the said lot seven, in square two hundred and twenty-three, in the said city of Washington, and may produce and bring into court here all deeds and other evidences of the title to such lot to be inspected by and disposed of by the court—

The complainants pray as follows:

1. For writs of subpœna against such of said defendants as *said* within the jurisdiction of the court.

2. For an order of publication against such of said defendants as reside without the jurisdiction of the court.

3. That a decree may pass commanding and directing the said defendants, Brooke Mackall and Brooke Mackall, Junior, to make known and discover to the court the rendition of the title to the said lot seven, in square two hundred and twenty-three, in the city of Washington, and to produce and file here in court all conveyances, deeds, or other evidences of the title to the said property as
may be in their possession or within their reach.

195 4. That a decree may be passed for the sale of the said lot seven, in square two hundred and twenty-three, under the directions of the court and by an officer appointed thereby, and the proceeds of such sale applied to the payment, first, of the incumbrances existing and being on the said lot, and, next, so far as the

same will go, to the payment of the several judgments of the complainants, with the interest and costs accrued thereon, as hereinbefore specified, the amount of such incumbrancy and judgments to be ascertained by the auditor of the court.

5. That the complainants may have such other and further relief in the premises as the nature of the case may require.

W. B. WEBB,
Counsel for Complainant.

Separate Answer of Brooke Mackall, Jr.

Filed July 6th, 1871.

In the Supreme Court of the District of Columbia, this 3d Day of July, 1871.

ALFRED RICHARDS *et al.* *vs.* BROOKE MACKALL, JR., *et al.* } Equity. No. 2373, Doc. 11.

The separate answer of Brook Mackall, Jr., to the bill of complaint of complainants.

To the honorable judges of the supreme court of the District of Columbia, holding a special term of said court:

196 For answer to said bill I say as follows:

1. I admit the plaintiffs and defendants reside as stated in said bill of complaint.

2. I admit the plaintiffs Alfred and Thomas A. Richards recovered judgments against this defendant and defendant Brook Mackall as stated in the 5th paragraph of said bill, and also a sale of real estate described in said bill under a writ of *fieri facias* issued upon said judgment, the name of the purchaser, time of sale, amount of the sale, and distribution of the fund arising therefrom.

3. I admit the recovery of a judgment by Francis Wheatley, as stated in said bill, but deny it is a lien upon said property, for reasons hereinafter stated.

4th. I admit the recovery of a judgment by W. K. Owen & Thomas Wilson, as stated in the 5th paragraph of said bill; also a judgment recovered by F. Dunlin Parkinson, and one by Daniel Hannan, and one by Henrietta P. Pepper, and one by the Washington Gas Light Company, and one by Patrick O'Hare, and no payments made thereon, as stated in said bill.

5th. This defendant denies that he is the owner of that piece of real estate known as lot numbered seven (7), in square numbered two hundred and twenty-three, or any part thereof, and was not the owner thereof nor any part thereof at the time nor at any time since said judgments were rendered against him.

I never had any deed of conveyance nor any agreement in writing for a conveyance of said real estate, excepting a deed of date, I

believe, of 6th October, 1865, from the late corporation of Washington under a tax sale of said lot. Said deed I have lost.

197 I never put it upon record, but was advised by counsel somewhat learned in the law and verily believe said tax sale was erroneous and the deed predicated thereon void.

I believe and aver that defendant Brooke Mackall has the equitable, if not the legal, title to said property. I did not neglect to put said tax deed upon record for the purpose — concealing the ownership of said lot nor for the purpose — hindering, delaying, or defrauding anybody. I admit there is a large amount of arrears of taxes against said lot.

I have no deed or other evidence of title to said lot or any part thereof in my possession or under my contract.

And now, having fully answered, I pray to be hence dismissed, &c.

B. MACKALL, JR.

L. G. HINE,
Sol. for Def't B. Mackall, Jr.

I, Brooke Mackall, Jr., on oath say that I have read the foregoing answer by me subscribed and know the contents thereof, and that the facts therein stated as of my own knowledge are true, and as to those things stated upon information and belief I believe them to be true.

B. MACKALL, JR.

Sworn to and subscribed before me this 3d day of July, 1871.
R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Assistant Clerk.

198 *Decree.*

Filed May 1, 1873.

In the Supreme Court of the District of Columbia, the 1st Day of May, 1873.

ALFRED RICHARDS *et al.*
vs.
BROOKE MACKALL, BROOKE MACKALL, JR., *et al.* } In Equity. No. 2373, Doc. 11.

This cause coming on to be heard upon bill, answer, and the depositions taken and filed therein and being duly considered, it is by the court this first day of May, 1873, upon motion of the plaintiffs' solicitors, ordered, adjudged, and decreed that the title to the said real estate in the proceedings in the said cause particularly mentioned—that is to say, to all of lot numbered seven, in square numbered two hundred and twenty-three, in the city of Washington—not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards is vested in the defendant Brooke Mackall, Jr., and that the same be sold for the purpose of paying

the judgments and other incumbrances particularly set out in said proceedings or that may be in any other way existing thereon, and that William B. Webb and Thomas Wilson be, and they are hereby, appointed trustees to make sale thereof, and that the manner of proceeding in making said sale shall be as follows: First, they shall file with the clerk of the court a bond to the United
199 States in the sum of twenty thousand dollars, with sureties to be approved by the court or a judge thereof, conditioned for the faithful discharge of the duties imposed upon them by this decree or that may be imposed upon them by any further order of the court passed in the cause; second, they shall sell the said real estate at public auction to the highest bidder, first giving notice of the time and terms of sale, which shall be upon the premises, by advertisement in some newspaper in the city of Washington, the first insertion of said advertisement to be at least four weeks before the day of sale, the terms of said sale to be as follows: One-third of the purchase-money to be paid in cash and the balance in equal payments in nine, twelve, eighteen, and twenty-four months, the purchaser or purchasers to give for the deferred payments his or their promissory notes, secured to the satisfaction of said trustees; third, that they shall report the said sale to the court, with an affidavit as to its fairness and good faith, and upon the full ratification thereof shall convey the said property to the purchaser or purchasers, and shall thereby vest in said purchaser or purchasers the title thereto of any description and however *substituting* in any way in each and every of the said parties to these proceedings, and that this decree shall of itself operate to divest and take out of the said Brooke Mackall all title of whatever kind in the said property he may have and vest the same in the said trustees for the purposes hereinbefore set forth and contained.

By the court:

A. WYLIE.

200 *Decree of July 24, 1877.*

ALFRED RICHARDS *et al.*
vs.
BROOKE MACKALL *et al.* } 2373, Equity Docket 11.

This cause came on, this 24th day of July, 1877, to be heard upon exceptions filed by Brooke Mackall, Jr., to the sale and report thereof by the trustees appointed to sell the property in controversy and to the confirmation thereof, and, having been argued by counsel, it is ordered, adjudged, and decreed that the said exceptions be, and the same are hereby, sustained, and that before sale can be made of said property the amount to be sold must be definitely ascertained by some proper legal procedure.

By the court:

A. W.

Decree of 1879, *December* 11.

ALFRED and THOMAS A. RICHARDS *et al.*
vs.
BROOKE MACKALL *et al.*
2373, Equity Docket 11.

This cause coming on to be heard upon exceptions to the report of the special auditor, made under the order of this court,
201 referring the same to him to ascertain the boundaries of certain parts of a lot of ground in the city of Washington, in the proceedings in this cause particularly mentioned, and upon a motion to modify the order of 24th July, 1877, by which the trustees were forbid to sell the certain portions of the said lot under the decree passed for that purpose until the said boundaries were ascertained as aforesaid, and said exceptions having been duly considered, it is ordered by the court, this 11th day of December, 1879, that the same be sustained; and the court, proceeding to determine the said boundaries in accordance with the said order of July 24th, 1877, does further order that the trustees under the said decree shall sell, in accordance with the terms and provisions thereof, all that portion of the said lot seven, in square 223, in the city of Washington, lying south of a line drawn from a point on the line of Fourteenth street northwest, westwardly and parallel with New York avenue, to the west line of the said lot seven. This order is made without passing upon the validity of the said marshal's sale.

By the court:

MACARTHUR, *Justice.*

202 *Decree.*

Filed April 5, 1881.

In the Supreme Court of the District of Columbia, Holding a General Term.

ALFRED RICHARDS, THOMAS WILSON, *et al.*
v.
BROOKE MACKALL *et al.*
No. 2373. Equity.

This cause coming on to be heard and having been argued by counsel and submitted to the court, and application having been made by Thomas Wilson to be removed from the trust to which he was appointed heretofore in said cause, for reasons satisfactory to the court, it is by the court in general term, this fifth day of April, eighteen hundred and eighty-one, ordered, adjudged, and decreed that the said Thomas Wilson be, and he hereby is, discharged from the said trust, and that Westel Willoughby be, and he is hereby, appointed trustee in the place and stead of the said Thomas Wilson, and shall be authorized to act as cotrustee with William B. Webb,

heretofore appointed trustee in this cause, upon giving bond, with security to be approved by the court, in the sum of ten thousand dollars, and it is further ordered that so much of the decree of the court in special term as orders that a sale be made of the property mentioned in the proceedings be, and the same is hereby, affirmed, and that the said trustees, William B. Webb and Westel Willoughby, shall proceed at once to sell, under the terms and conditions and for the purposes set forth and contained in the decree passed in this cause on the first day of May, 1873, and affirmed by the
203 Supreme Court of the United States on appeal, all that part of lot numbered seven (7), in square numbered two hundred and twenty-three (223), in the city of Washington, in the District of Columbia, lying south of a line drawn from a point on Fourteenth street forty-four feet south of the northeast corner of said lot, and running thence parallel to the line of New York avenue to the west line of the said lot, this decree to be construed as not determining any question of title to any portion of said lot seven lying north of said line.

And from this decree the defendant B. Mackall, Jr., prays an appeal to the Supreme Court of the United States, which is allowed.

By order of the court:

D. K. CARTTER,
Chief Justice.

204 *Decree of May 6, 1885.*

ALFRED RICHARDS and THOMAS A. RICHARDS *et al.*, Complainants,
vs.
BROOKE MACKALL, JUNIOR, *et al.*, Defendants. } No. 2373. Equity.

The decree of this court in this cause of the 5th day of April, A. D. 1881, having been, by appeal by Brooke Mackall, Junior, taken to the Supreme Court of the United States, and the said Supreme Court having by its decree of November 24, 1884, reversed the said decree of this court, with costs, and adjudged that the defendant Brooke Mackall, Junior, recover against the complainants seventy-three dollars and twenty-six cents for his costs in said court expended and have execution thereof; and the said Supreme Court of the United States having by its said decree remanded the cause to this court with directions to set aside the decree from which said appeal was prosecuted and to order the sale, in satisfaction of complainants' demands and in *each* mode as may be consistent with the practice of the court and with law, of all of lot seven (7) outside of that upon which the building known as the Palace market stands, and commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of the said Supreme Court of the United States, as according to right and justice and the laws of the United States ought to be had, the said appeal to said Supreme Court of the United States not-

withstanding: Now, therefore, in conformity with the said
205 decree of the Supreme Court of the United States and its command aforesaid, it is by this court now *here* ordered, adjudged, and decreed that the said decree of this court from which the said appeal to the Supreme Court of the United States was prosecuted be, and the same hereby is, set aside, and that the sale in satisfaction of complainants' demands be made in said mode as shall be hereafter prescribed by a further decree in the case.

206 *Abstract of Pleadings.*

Supreme Court of the District of Columbia, in General Term.

ALFRED RICHARDS *et als.*
vs.
BROOKE MACKALL, JR., *et als.* } Equity. No. 2573, Doc. 11.

Abstract of pleadings.

By the original bill, filed May 2, 1871, Alfred Richards and others, as judgment creditors against the defendant Brooke Mackall, Jr., seek to subject to sale, for the satisfaction of such judgments, all of lot No. 7, in square No. 223, in Washington city, not before sold by the marshal of the District of Columbia, claiming that said B. Mackall, Jr., has such equitable interest therein as renders it liable to the satisfaction of such judgments.

Answers thereto were made by said B. Mackall, Jr., and also by his father, one of the defendants, admitting the recovery of the judgments set forth, but denying that said B. Mackall, Jr., had such equitable interest as would be subject to the satisfaction of such judgments.

Subsequently, in May, 1873, decrees were made, afterwards affirmed by the United States Supreme Court, adjudging that the said B. Mackall, Jr., had title to the said property, by reason of which it was subject to the satisfaction of such judgments, and directing a sale for such purposes of all of the lot not
207 before sold by the marshal. It was afterwards decreed by the United States Supreme Court that in any event the marshal's sale, if valid, did not embrace any portion except that covered by the building known as the Palace Market building.

In May, 1886, the said Brooke Mackall, Jr., filed a supplemental and cross bill, alleging as follows:

1st. That all of the judgments not paid were barred by the statute of limitations, being over twelve years, and not revived by *scire facias* or otherwise.

2d. That since the decree certain of the judgments had been paid; that there never was a valid judgment in favor of H. P. Pepper, an alleged judgment creditor, no summons having been served upon this defendant, the summons having been served upon his father, B. Mackall; that Alfred Richards was now the owner of judgments obtained in favor of A. & T. A. Richards and in favor of F. Wheatley.

3d. That the said A. Richards in 1870 took possession of a considerable portion of the premises involved in the suit and upon which the judgments were charged to be liens, and has ever since held possession thereof until the present, and still continues to hold the same and enjoying the rents, issues, and profits thereof, the value of which and damage to this defendant was more than $350 per annum, or in all at least $5,250, and has not accounted for any part thereof, which sum ought to be applied to the payment and satisfaction of any judgments that might be established in favor of said Richards, and decree should be rendered against him for any excess.

4th. That since the decree of 1873 this defendant, in equity suit No. 8118, had obtained a decree in general term setting aside
208 the marshal's sale and directing an account of the rents, issues, and profits received by said Richards and of expenditures incurred by him, this defendant claiming that upon such account it would appear that Richards would be indebted to him in a much larger amount than the judgments held by him, he having received rents of over $25,000. From this decree Richards had obtained an appeal and supersedeas to the United States Supreme Court, where the case is now pending.

5th. That this defendant in August, 1873, tendered to said Richards $1,362 to apply on judgments held by him.

The bill prayed for process; that the judgments not paid be held void; the certain money which had been deposited in court to satisfy the decree be relieved from the liens of said judgment; that defendant have decree for the rents, issues, and profits of the property involved in the suit to be applied to the judgments, and for the excess; that proceedings be stayed until an account could be had, and for general relief.

The answer of A. Richards is as follows:

1. The suggestions that the judgments are barred by the statute of limitations is not well taken.

2. Admits that A. Richards is the owner of the judgments as alleged, they being unpaid.

3d and 4th. Denies that he ever took possession of any portion of the property as alleged, or has received any rents therefrom, except that he did take possession of the Palace Market building; that it was sold to him by the marshal and he paid the purchase-money and took possession and has held it and expended $21,000
209 upon it. A decree was passed in 8118, setting aside the sale, but an appeal from this is now pending in the U. S. Supreme Court. Upon an account the rents received by him would not exceed the expenditures paid by him, and the property would not sell for enough to pay his expenditures. The proceedings in 8118 are not material to the issues in this cause and should not be considered. He is entirely responsible for any decree that might be obtained against him.

5th. He denies that any tender was made, as alleged.

6th. He asks that reference may be made to his answer in equity cause No. 9782 as a part of this answer.

By an amended answer said A. Richards says that he was in error in saying that he had not taken possession of a portion of the property, and admits that he was in possession of a portion thereof, believing it to have been embraced in the part sold to him by the marshal.

George H. Plant, administrator of H. P. Pepper, answered, setting up the death of said H. P. Pepper and his appointment as administrator and denying that the debt is barred by the statute of limitation. He has no knowledge of the allegations relating to the judgment of H. P. Pepper; says it is now too late to urge such an objection; that the original bill set up this judgment and it was admitted by this defendant, and for such reasons the defendant should be estopped from making such objection, and that the judgment was for money loaned, of which this defendant had the benefit.

Replications to the several answers were duly filed.

210 *Brief of Westel Willoughby.*

Filed July 12, 1894.

In the Supreme Court of the United States.

BROOKE MACKALL, JR., Appellant,
vs.
ALFRED RICHARDS *et al.*, Appellees. } No. 1018.

1.

This motion professes to be made upon the grounds that the decree is not final, and that it was made simply in executing a former mandate of this court. In the argument filed in its support no reasons are given to show why the decree is not final except that it is a decree made in accordance with such former mandate, the last-mentioned ground being the principal reason given for a dismissal of the appeal.

2.

We claim, first, that these are not proper grounds for a motion to dismiss an appeal, but are to be considered only at the hearing. The Supreme Court will not entertain a motion to dismiss a cause or to advance it for argument on the ground that the appeal or writ of error is without merit, is sued out for delay, or the like. The power to adjudge damages is the only power the court possesses to prevent frivolous appeals and writs of error.

134*a* Amory *vs.* Amory, 91 U. States, 356.

The court, too, has said, "We will not decide motions to dismiss before the record is printed when there is any question about
211 the fact on which the motion rests."

National Bank *vs.* Insurance Co., 100 U. S., 43.

An examination of the record will show a very serious dispute as to the facts. We most certainly and in good faith deny that the decree appealed from "was made in the course of the execution by the court below of the mandate of this court and in exact conformity with that mandate.

We emphatically disclaim all idea of attempting to avoid in any manner the former decree affirmed by this court, but we justify this appeal by the language of this court in the principal case cited by the counsel for appellee and from which he, on page six of his brief, presents an extended extract. We cite what he omitted: "If in the progress of the execution of the decree after its entry either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for examination only the proceedings subsequent to the mandate."

Stewart *vs.* Solomon, 97 U. S., 362.

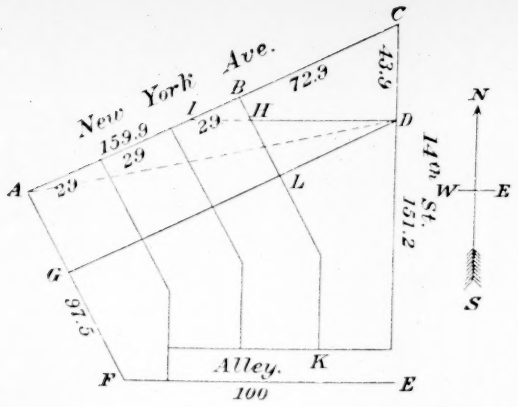
The principal upon which the appeal was dismissed in that case was, as stated, that the second decree was "in exact accordance with our mandate upon a previous appeal;" that is not the case now before the court. "When the subordinate court commits any substantial errors in executing the mandate of the Supreme Court it is well-settled law that a second writ of error or appeal, as the case may be, will lie to correct the error and to cause the mandate to be executed according to its tenor and effect."

See also 20 How., 135–181.

212 III.

134 We refrain from entering into a full discussion of the merits, deeming it improper to do so upon this motion and not feeling called upon now to disclose to our adversaries all we may have to urge at the proper time, but it is proper to show that our complaint arises from the action of the court, not in "exact accordance with the former mandate."

The controversy concerns lot No. 7, in square 223, at the southwest corner of New York avenue and Fourteenth street, in Washington, D. C., of which the following is a diagram substantially as it appears from the book of the surveyor of the city, made before the erection of the building and in conformity with which the foundations of the building were laid.



A C E F is the entire outline of the lot; B C D H is a building thereon, now known as the Palace market.

A C, New York avenue, is claimed by the appellant to be the front of the lot; C E, 14th street, is claimed to be the front
213 by the appellees.

The three crooked lines running from N. Y. Ave. and the
134e building to an alley bordering on F E show the smaller lots into which the original lot No. 7 was divided, as appears upon the surveyor's book.

The bill of complaint was filed by a considerable number of persons claiming to be creditors of this appellant, Brooke Mackall, Jr., and its object was to show that he had an equitable interest in the portion of this lot as "not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards. In the bill it is alleged that a portion of this lot, described therein as follows, to wit, "Beginning at the northeast corner of said square and running thence south forty-four feet, thence westerly to the west end of the lot, thence in a northerly direction with the west line thereof to the north line of said lot, then with said northerly line to the place of beginning," had previously been sold to the principal complainant, Alfred Richards, by the marshal in pursuance of the proceedings founded upon mechanics' liens under a statute which provides (sec. 704, R. S. D. C.) that "the ground on which the building is erected and a space of ground equal to the front of the building and extending to the depths of the lot or lots on which it is erected shall also be *erected shall also be* bound by the said lien," &c., and the object of the bill was to subject the remainder of such lot to the lien of the judgment creditors who filed the bill.

214 The whole controversy was, as shown by the answer and all the proceedings and the decree itself, whether the said remainder of the lot was the property of B. Mackall, Sr., or whether B. Mackall, Jr., had an equitable interest therein, subject to the lien of such judgments.

The only point adjudged by the decree was "that the title to the said real estate in the proceedings in the said cause particularly mentioned—that is to say, to all of lot numbered seven, in square numbered two hundred and twenty-three, in the city of
134d Washington, not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards—is vested in the defendant Brooke Mackall, Jr." The decree adjudges nothing else, but provides for a sale of this remainder to satisfy the lien of the judgments and encumberances thereon.

This decree being affirmed, the mandate came in the following terms:

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

This mandate simply affirms the decree. It does not make any new order. The authority of the trustees appointed by the decree is not found in the mandate, but in the decree, affirmed, it is true, by this court. There is no thought of attempting to reopen the question thus settled.

4.

When, however, the trustees appointed to make the sale
215 proceeded to do so they met a difficulty which had not before occurred to any one. A new question was then first presented, and that was, What was the property described in the decree and which they had been directed to sell?

Upon this question we claim that the proceedings below have not been "according to right and justice," as the mandate requires.

In order to determine the property as described in the bill and in the decree it became necessary to ascertain what had before been sold to Alfred Richards by the marshal. On examining the description of the mechanics' lien upon which the proceedings authorizing the sale were had it was found to be as follows:

"Beginning at the southwest corner of New York avenue and 14th street, thence running south 44 feet on 14th street; thence west to the west line of said lot number seven; thence in a
134e northerly direction with the west line thereof to the north line of the said lot; thence in a northwesterly direction to the place of beginning."

This is also the substantial description in the executions and in the advertisement of sale. An inspection of the diagram will show that the line running west, D I, as described would run into New York avenue at about the middle point of the line bordering on such avenue. It was claimed, however, by Richards that this line should run parallel to New York avenue by the line D G. The dotted line A D represents the southern line of the lot as described by the marshal's deed as claimed by the appellant.

216 This question involved the title to 4,700 feet of ground, valued by the most reliable witnesses at $4 per foot, making over $18,000.

(See testimony of Latta, Mackall, &c.)

It was also claimed by the appellant that under the act in relation to mechanics' liens, the front being upon New — avenue, the property described thereby should have been that contained within the lines B C E K instead of taking the whole of the front, making the remainder of very little value, as the evidence in the record conclusively shows.

(See testimony of Latta, &c.)

Even if the 14th-street — were the front according to the mechanics' lien law, it is claimed that by that law the lines embracing the lots should run perpendicularly to such front, and not at such acute angle as the mechanic may wish, which would support our view that the southern boundary according to such law should be the line D I.

The trustees, who were also counsel for Richards, proceeded to make sale, but recognizing in part the difficulty, say, at the sale, as appears by writing accompanying their report and now in the record, which is the correct description—that is, whether the
134*f* southerly line runs parallel to New York avenue or directly west—"is a legal question which the trustees do not undertake to determine. If Richards' line goes westerly by the wall of his house, then the present purchaser gets a greater number of feet in his lot; but if Richards' line goes westerly by the fence
217 continued to the rear of the lot, then the present purchaser gets fewer number of feet. This leaves the number of square feet indeterminate, and therefore we will not sell by the foot, but in bulk."

Under such an announcement, of course the property sold at an immense sacrifice. Exceptions were taken to it, which were sustained, and the court further decreed "that before sale can be made of said property the amount to be sold must be definitely ascertained by some proper legal proceedings."

(See decree of Judge Wylie of July 24, 1877.)

Thereupon the plaintiff, believing an ejectment suit a "proper legal proceeding" to determine this question, caused such a suit to be brought by the party holding the legal title, not a party to this suit, to the lot in question, which suit is still pending.

(See affidavit of Brooke Mackall, Jr.)

But the appellees, not satisfied with this, persisted in an effort to ascertain the proper boundaries by a reference to an auditor to take testimony and report thereon.

Now we claim this mode of proceeding to have been radically wrong. To determine such an important question, involving the title to property valued at $18,000, there should be some regular suit or proceeding, in which there should be a pleading, setting up distinct allegations to which issue could be taken, upon which the judgment of the could be had, with an unquestioned right of appeal, if necessary, to the Supreme Court of the United States. Certainly the holder of the legal title should be a party to such inquiry. The

bill in this case was a mere creditors' bill, and presented only
218 the question whether the appellant had an equitable interest in the balance of the lot not sold by the marshal. There was no suggestion of any controversy as to boundaries.

The submission of such a question too entirely changed the relations of the parties to the suit. It presents a question between Alfred Richards alone and the Mackalls. The other judgment creditors have no interest in common with him. On the contrary, their interests are adverse to the claim, for it is for their interest that the property to be subjected to the payment of their judgments should embrace this ground in controversy. In fact, the claim of Alfred Richards, as owner, is adverse to and incompatible with his interest as a judgment creditor, in which character alone he brought his suit. He thus sought, by this incidental inquiry, a determination of his ownership for the valuable property in dispute, in direct antagonism to his interest as a judgment creditor and to the interest of his co-complainants, without a suggestion of his claim in the bill or written allegation to which issue might be take- or without making the holder of the legal title a party—a proceeding we claim to have been in plain violation of the necessary and well-established rules of practice of courts of equity, if not indeed wholly beyond the jurisdiction of a court of equity.

But the reference was made. A very large amount of testimony was taken before the auditor, and thereupon he made his report, which is very full, elaborate, and exhaustive. He recites the various descriptions of the different mechanics' liens, the execu-
219 tion, the advertisement of sale, and finally the marshal's deed. He also refers to the testimony as to which is the proper front, and concludes that, on account of the inextricable confusion arising from all these, it is impossible to ascertain the boundaries, and so reports. Indeed it is perfectly manifest from his
1347 report that the only possible solution of the question is, by declaring the sale by the marshal entirely void. At the proper time we shall be prepared with authority to show that such must be the result. Of course, on the coming in of this report, the court had no better data upon which to determine the boundaries than it had at the time the decree was made, two years before, directing that before sale the amount "be definitely ascertained by some proper legal proceeding."

But the court, then held by another judge, boldly took the matter in hand and adjudged and decreed as follows:

"And the court, proceeding to determine the said boundaries, in accordance with the said order of July 24, 1877, does further order that the trustees under the said decree shall sell, in accordance with the terms and provisions thereof, all that portion of the said lot seven, in square 223, in the city of Washington, lying south of a line *down* from a point on the line of 14th street northwest westwardly and parallel with New York avenue to the west line of said lot seven. This order is made without passing upon the validity of the said marshal's sale."

From this decree an appeal was taken to the general term, where

the order to sell the portion of the lot south of the line run-
220 ning parallel to New York avenue was affirmed, but leaving the question of title to the portion north of such line undetermined and unsettled.

5.

Now, this decree is not "in exact accordance" with that upon which the mandate issued, but differs widely from it.

By the former decree the trustees were directed to sell all that had not before been sold by the marshal.

By this decree a portion is directed to be sold, but not
134/ necessarily all that had not before been sold. The last decree leaves it undetermined whether the part directed to be sold is that — had not before been sold.

The first decree made no determination whatever as to the part before sold, but the last one does determine that the portion represented in the diagram by D E K L was a part not before sold by the marshal, and substantially determines that the front of the lot was on 14th street and not on New York avenue, a point which may be vital in determining the validity of the title north of the line D G.

6.

But it is urged that this is not a final decree. Whether it is or not, as we have before shown, is not a question to be determined upon a motion to dismiss the appeal, but only upon a full argument made upon a printed record at the final hearing. Then we will be fully prepared, as we think, to show that it is a final decree from which an appeal may be taken. But we will offer some suggestions now upon this point:

By the first decree, made after the issuing of the mandate,
221 it was adjudged "that before sale can be made of said property the amount to be sold must be definitely ascertained by some proper legal proceeding." This decree was eminently right, and no appeal was taken from it. It gave to us a substantial right. That this was sufficiently final for the purposes of an appeal to the general term cannot be disputed, and not having been appealed from within thirty days, according to the rules of the court, it became an established right. Independently of such a decree, it is a well-established principal that questions affecting the title, questions of jurisdiction, questions of boundaries, and other questions materially affecting the value shall be ascertained before it shall be sold by the court. It is a substantial right of the party
134/ whose property is to be sold by order of the court that it shall not be sacrificed by having it sold subject to such doubtful questions.

See Caldwell *vs.* Taggart, 4 Peters, 201.
Brent *vs.* Moran, 25 Grat., 104.
Cole's Adm'r *vs.* McRae, 6 Rand, 644.
Lipscomb *vs.* Rogers, 20 Grat., 658.

This right so established by the decree, and to which we are entitled according to well-established principles of law, is the right

for which we have been struggling ever since it became manifest that such serious questions arose, and it is that right denied to us by the decree from which this appeal is taken, but which had not been denied by the former decree.

222 Every lawyer in respectable practice has had cases in which injunctions against the sale of real estate by a trustee in a deed of trust to secure a debt have been granted upon similar grounds.

Suppose, for example, that in this case the trustees were acting under a deed of trust to sell the part of the lot which had not previously been sold by the marshal; that a bill is filed setting up that a serious question arises as to what was such portion; that in order to avoid such question they propose to sell a portion of the lot; that by the way they thus propose it will cause a needless sacrifice of the property; that the situation of the lot is such that it cannot be divided into such separate parcels without practically destroying the value of the whole, and that therefore the question of title as to the whole should be settled before the sale, would it be said that an injunction would not lie in such case; and, if denied, would there not be a right of appeal?

Suppose, for example, a lot 15 feet wide, worth nothing except for building purposes at that width, and a question arises as to seven feet, and it is proposed to sell the eight feet undisputed and leave the other seven feet for further action, and in such case it be
134 alleged that such division would render the whole worthless, or nearly so, would not this be a proper case for the interposition of a court and for an appeal if necessary?

Now, this is just what we claim. The decree of July 24, 1877, shows it, the proceedings and the evidence show it, and an inspection of the diagram must demonstrate it.

223 We are not now obliged to satisfy the court that our claim is just, but only to show that we have at least a right to be heard.

Nor can it be charged that by such means there would be unnecessary delay. Had the complainants proceeded as required by the decree of July 24, 1877, they could have had the question settled long ago.

7.

The construction given to the decree by the counsel for appellees (p. 5 of his brief) is that the boundary line has been definitely ascertained. This certainly would present a final determination from which the right of appeal must be unquestioned; but I do not so construe it. The question of title by the marshal's sale to the part represented in the diagram by the letters A I D C, and which, as we have before seen, embraces property valued at over $18,000, is left undetermined by the express terms of the decree of the general term.

But an inspection of the diagram will show at once how this works a great wrong to the appellees, leaving a wedge shape running to a point on 14th street. Suppose the sale should be made as decreed, and then it should be ascertained in the pending ejectment

suit or otherwise that the proper boundary line should be D I, thus leaving that to be sold under the first decree or the property of the appellee without liability to such sale. It is not perfectly
221 manifest that in such shape it would be almost entirely worthless? If it could be sold with the balance it would
134 bring its full value; but if required to be sold separately its value is substantially destroyed.

Can it be that from such a wrong or from liability to such a wrong there can be no appeal? The execution of the decree from which this appeal is taken is inevitable destruction to our rights to the value of the property subject to the first decree. No remedy for such a wrong can be suggested but by an appeal. The purchaser at the sale decreed would hold his title in spite of all we could do. All we ask now is that we may be heard before being sacrificed and destroyed, and we therefore insist that the motive to dismiss the appeal should be denied.

W. WILLOUGHBY,
Counsel for Appellant.

134*a* (Stamped:) Office Supreme Court U. S. Filed Nov. 5, 1884. James H. McKenney, clerk.

225 *Bill.*

Filed February 14, 1882.

In the Supreme Court of the District of Columbia. — Day of ——, 1882.

LEONARD MACKALL, BENJAMIN MACKALL, DON BARTON MACKALL, THOMAS OWENS, MRS. LOUISE OWENS
vs.
BROOKE MACKALL, JR., ROBERT CHRISTY & His Wife, MRS. CATHERINE CHRISTY. } Equity. No. 8038.

To the supreme court of the District of Columbia, holding an equity court for said District of Columbia:

The plaintiffs state as follows:

1. That they are residents of the city of Washington, in the District of Columbia, except Benjamin Mackall, who resides in the Territory of Utah, and except the complainant Thomas Owens, who is joined as complainant herein as husband of the complainant last mentioned; they bring this suit as heirs of and devisees under the will of the late Brooke Mackall, deceased.

2. That the defendants reside in the city of Washington and in the District of Columbia, and that the defendant Brooke Mackall, Jr., is sued in his own right as son of the decedent, and the
226 defendant Mrs. Catherine Christy is made defendant herein as a devisee under the will of the decedent, and that the de-

fendant Robert Christy is joined as husband of the defendant last mentioned.

3. That the decedent died in the city of Washington on or about the 7th day of March, 1880, seized and possessed of the real estate located in the city of Washington and in the town of Georgetown, in the District of Columbia, described in the accompanying schedule, marked Exhibit "A," herewith filed, and which is prayed to be taken as part of this bill.

4. That on the 9th day of December, 1879, the decedent made his last will and testament, which was probated in the orphans' court of the District of Columbia on the — day of ——, 18—, and which is recorded in the office of the register of wills of said District, in Book No. 18, page 189, a certified copy of which is herewith filed and prayed to be taken as part of this bill.

5. That there is recorded in Liber 936, page 252, in the office of the recorder of deeds of the District of Columbia, a deed alleged to have been executed on the twenty-seventh day of February, 1880, by the decedent to the defendant Brooke Mackall, Jr., and which purports to have released unto the said Brooke Mackall, Jr., all of the right, title, and interest of the decedent in the several pieces and parcels of real estate hereinbefore described as embraced in the Exhibit A, for valuable consideration, to wit, for the considerations of services performed, moneys advanced, and five dollars in
227 lawful money paid by the defendant Brooke Mackall, Jr., to the decedent, and the complainants beg to refer the court for fuller knowledge of the contents of said deed to said indenture, the effect of which, when produced, will more fully appear; and the complainants aver that the decedent was seized with the malady which ended in his death on or about the 10th day of January, 1880, in the said city of Washington, in the District of Columbia; that his illness was from his incipiency of a severe type and increased in intensity until his death; that during the entire period of his illness the decedent was in a condition of body and of mind that rendered him incapable of performing any business act; that during the whole period of said illness the decedent was kept by the prescription of his physicians under the influence of opiates and of narcotic remedies; that two weeks after the beginning of his illness, to wit, on or about the 24th day of January, 1880, the defendant Brooke Mackall, Jr., forcibly removed the decedent from his room on the 2nd floor of his boarding-house to a small and uncomfortable apartment on the 3d floor of the same.

That he kept a close watch over the decedent in said room until his death and excluded from said room the rest of decedent's family except upon stated occasions, when he permitted certain of the complainants to visit the decedent under his surveillance; that he systematically persisted during said illness in keeping from the decedent, as far as he could, the decedent's relations and all of
228 his most intimate acquaintances, and resorted to deception and artifice to enable him to accomplish these ends; that he frequently said during decedent's illness to members of decedent's family "that the decedent was getting better"—"was recovering,

&c."—to prevent the impression getting among decedent's friends of his real condition; that he said to a relative of decedent, one Mrs. Scott, upon a certain day during decedent's illness, in reply to her suggestion that a clergyman be sent for to administer spiritual comfort to decedent, to see a minister, and declined permitting the decedent during his illness to see a minister of his own denomination or any other clergyman with whom the decedent had had a previously intimate or long acquaintance; that upon another day during said illness the said defendant, Brooke Mackall, Jr., stated to the said Mrs. Scott and to the defendant Mrs. Catherine Christy that his father was in no condition to make a will, and upon said day forbad the said parties from seeing the decedent, charging them with the design of inducing the decedent to make a will.

And the complainants aver that the deed of conveyance from the decedent to the defendant Brooke Mackall, Jr., is unsupported by any consideration whatsoever, and that it was procured from the decedent by the defendant Brooke Mackall, Jr., through means of fraud, undue influence, duress perpetrated and exerted by the said defendant upon the decedent; that the decedent and the defendant Brooke Mackall, Jr., resided together to the exclusion *to* the other members of decedent's family at different boarding-houses in the city of Washington subsequently to — day of ——, 18—, until death of decedent,
229 and that during the larger portion of said time the said defendant was supported by the decedent; that during said time said defendant performed no services for the decedent that a father has the right to expect from his son; that said defendant had no independent source of income during most of said period; that during said period of time, to wit, from the — day of ——, 18—, to death of decedent, he collected the rents from decedent's improved property in the city of Washington and in the town of Georgetown and in all respects controlled said property, and that he reserved from the rents collected from the same — large amount each year for his own use; that during said time he denied his father money for anything save the mere necessities of life and neglected for several years to pay taxes upon decedent's real estate in said city of Washington and town of Georgetown, and upon several occasions bought up decedent's property at tax sale with the view of becoming permanently possessed of the same; that during his life the decedent had provided handsomely for said defendant, and that from time to time during his life large sums of money had been extorted from decedent by said defendant; and the complainants aver that from the whole period of time embraced from the — day of ——, 18—, to the day of decedent's death the said defendant practiced towards the decedent acts of imposition and of deception and measures of coercion of the most flagrant character.

Wherefore, premises considered, plaintiffs pray:

Prayers.

1. That a writ of *subpœnæ duces tecum* issue to the defend-
230 ant Brooke Mackall, Jr., requiring him to answer the exigencies of this bill and to bring with him into court the deed of conveyance from the decedent to said defendant, bearing date February 27th, 1880.

2. That writs of subpœna issue to Robert Christy and to Catherine Christy requiring them to answer this bill.

3. That a decree be made by this honorable court declaring null and void and of no effect the deed of conveyance executed on the 27th day of February, 1880, by the decedent to the defendant Brooke Mackall, Jr., and ordering the same to be delivered up to the complainants and affirming the validity of the will made by the decedent on the 9th day of December, 1879.

4. And the complainants pray for *each* general and further relief as in equity they may be entitled to; and the complainants will ever pray.

LEONARD MACKALL.

ROBERT M. NEWTON,
Solicitor for Complainant.

I do solemnly swear that I have read the bill by me subscribed and know the contents, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

LEONARD MACKALL.

231 Subscribed and sworn to before me February 14, 1882.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

Answer of B. Mackall, Jr.

Filed June 2, 1882.

Supreme Court of the District of Columbia.

LEONARD MACKALL *et al.*
vs.
BROOKE MACKALL, JR., *et al.* } Equity. No. 8038.

The defendant Brooke Mackall, Jr., not waiving his demurrer, but relying thereon, and saving and reserving to himself now and at all times hereafter all manner of benefit and exception which can be had thereto, for answer thereto says:

1st.

He admits the residence of the complainants as charged in the first paragraph of said bill.

2nd.

He admits the residence of the parties named in the second paragraph as charged; that he is the son of said Brooke Mackall, & Robert Christy is the husband of said Catherine Christy, the sister of this defendant.

3rd.

He admits that Brooke Mackall, Sr., died as alleged in paragraph 3, but denies that he died seized & possessed of the real estate referred to therein or any part thereof.

232 4th.

This defendant is informed and believes that on or about December —, 1879, as charged in paragraph four, said decedent made what purports on its face to be a will, as set forth in said bill, but this defendant denies that it was his last will and testament.

He says that said decedent at his death had no estate of any appreciable value, he having previously conveyed all he had by the deed described in the bill to this defendant, and thereby whatever may have been the intention of said will it was subsequently revoked before the decease of said decedent.

This defendant is also informed and believes and therefore charges that the said decedent was induced to execute said will by improper influence and false representations of said Leonard Mackall to the decedent concerning this defendant, without which he would not have made the said will and which alone would have been sufficient to avoid such will.

5th.

This defendant admits the execution of the conveyance of said Brooke Mackall, Sr., to this defendant as charged in paragraph five, and that his last illness commenced at about January 10th, 1880, as alleged.

But this defendant denies that he was regarded as dangerously ill until a short time before his death. He denies that he was in a condition of body and mind that rendered him incapable of performing any business at or before the time of the execution of said conveyance, and he denies that he had been kept under the
233 influence of opiates or narcotic remedies at or before the time of said conveyance. Defendant denies that he forcibly removed the said decedent from one room to another, as charged, but he removed him by the advice of his physician and at his request because it was more suitable and comfortable. He denies that he excluded from the room the rest of decedent's family or any of his relatives or acquaintances, as charged, or that he resorted to any description or artifice or knowingly misrepresented his condition, or ever stated to any one that his father was in no condition to see a minister, or ever denied permission of any clergyman to see him, or interposed any obstacle whatever to such visits except at short occasional intervals under the physician's advice.

He denies that he ever stated to Mrs. Scott or Mrs. Christy or to any one else that his father was in no condition to make a will or forbade them from seeing him or charged them with a design of inducing the decedent to make a will.

He denies that the said deed of conveyance was induced through any fraud, undue influence, or duress. He admits that he had resided with his father for several years, the other members of his family, including the complainants, having heartlessly and without good cause abandoned their father for many years and leaving no one to take care of him or wait upon him but this defendant, and during all that time this defendant did all in his power to perform the proper duties of a son to his father, but he denies that he was supported by said decedent, as charged.

Defendant denies that during that time he rendered no services for the decedent that a father has not the right to expect from his son, but, on the contrary, he rendered valuable services and
234 contributed to the support of his father.

He denies that he had no independent source of income, as charged. He denies that he has received large amounts from the property of his father and applied them to his own use. He had for a long time the management of the estate of his father and did all within his power to aid him, but such estate has, for causes arising out of seizure by the military authorities and other causes beyond the control of either this defendant or his father, produced but a very small income and has brought this defendant into great indebtedness and trouble.

This defendant denies all of the allegations of paragraph five inconsistent with the most entire honesty and integrity or inconsistent with any duty due from a son to his father or from himself to any of his relations.

He says that during all the last illness of his father he devoted to him his whole time and strength both day and night; so far as possible gave every possible facility for visits to him from his clergyman, his friends, and relatives; employed physicians for him at his own expense, towards the payment of which said complainants did not contribute, and gave to him every possible comfort and care, while these complainants, his own children, failed to contribute money, time, or care, and apparently desired to see him only to secure in some way some benefit from his property after his death, none of them having scarcely visited him for many years nor having manifested any interest in his welfare *doing* that time, but, on the contrary, frequently sought to injure his feelings in different ways, having towards him most unnatural hostility and
235 treating him at times with great cruelty.

This defendant says that said decedent when he executed the said conveyance was in the full possession of his mental faculties and fully understood its purport and effect; that it was done under no improper influence and without any misrepresentation or fraud, but was for a valuable consideration and in substantial pursuance of his intention which he had formed at least twenty years before his death.

6th.

Further answering, this defendant says that more than twenty years ago his father and mother became involved in a most distressing controversy, out of which arose separation and very bitter and protracted litigation, in relation to which this defendant espoused the cause of his father with great earnestness, while the complainants took up the side of their mother, showing great hostility to their father, by reason of which occurred great variance and intercourse between said complainants and their father almost ceased, and so continued until a few months before the decease of their father, when said Leonard Mackall sought to renew it, but only for a short time, during which time he procured him to execute such will of December, 1879, as before described.

Some time after the commencement of such unfortunate controversy, this defendant being in full accord with his father and having acquired some property of his own and working with and for his father, an arrangement and agreement was had between this defendant and his father by which his father promised and
236 agreed, for a valuable consideration, to convey to this defendant that property on the corner of 14th street and New York avenue, in this city, when he should be able to procure the legal title thereto, and placed this defendant in possession of the same. He then commenced to improve said property and paid out large sums therefor and incurred great indebtedness, to wit, several thousand of dollars, in and about improving the same, relying upon said promise, and has ever since to the best of his ability devoted himself to the care and management of the same, incurring very large expense and indebtedness thereby, but has never been able to realize but small income therefrom, owing to its having become involved in very expensive litigation.

Defendant refers to the frequently repeated declarations of said decedent appearing in the printed record of Mackall and others *vs.* Richards and others in the Supreme Court of the United States, where he states his having given said property to this defendant and his intention to make a deed therefor, as appears by the following extracts, to wit:

Extract from answer of B. Mackall, Sr., in said suit dated July 12th, 1871.—"That he purchased said lot and promised to give it to his son, Brooke Mackall, Jr., at some future time, but has not since been in a financial condition to carry out such intention and has never given him any conveyance of the said lot nor any paper-writing relating to said lot."

Deposition in Same Case of Brooke Mackall, Sr., November 28th, 1865.

"I purchased lot 7, in square 223, in November, 1851, of Key and Dunlop, one-half, the other half of W. W. Corcoran, and paid them for the same. The trustee, W. H. Nichols, refused to give a deed for Key and Dunlop's half unless they paid him some
237 four or five hundred dollars which he claimed of them. I had to file a bill in chancery, by my attorney, W. S. Cox,

who obtained a decree in my favor some years since. Mr. Corcoran also refused to give me a deed unless I paid him additional for some back taxes, which I refused to do. I never did get a deed until the other day, since his return from Europe. This property I gave to my son, Brooke Mackall, Jr., some years ago, and he has had it in possession ever since, and has subdivided them into six lots. There is not a more valuable property in the city, as is the belief of many good judges. He *rendered* the part occupied as a restaurant on the 9th February, 1863, and has been drawing the rent ever since. The Secretary of War took nearly the balance December 20th, same year, and I promised to pay fairly for it. Not getting a deed, I could not give him one. In examining the record of tax sales for some other property, he accidentally found that Mr. Hyde, Corcoran's clerk, had purchased it at a tax sale nearly some two years before that. In a few days it would have been beyond redemption. He called on Mr. Hyde and obtained from him a transfer of the certificate of sale from the corporation, on which he obtained a perfect deed from the corporation of Washington city, as per act of Congress making such sales a perfect title, as the court had decided. I gave for the property, in 1851, thirty cents a foot, and Mr. Reed, on the corner below, gave twenty-five cents. He sold his small lot and house the other day for seventy thousand dollars, as per his statement in your possession. Mr. Corcoran gave fifteen thousand
238 dollars for his residence on H street and paid only eight cents a foot for adjoining lots now enclosed in his garden. It would now bring ten dollars a foot, such is the advance of property in this city. Why should my son be deprived of that advance? Had the secretary not have taken it, it would have brought him much more than those highly respectable gentlemen that valued it on their oaths put it.

(Signed) B. MACKALL.

Sworn to and subscribed before me this 28th day of November, 1865.

(Signed) CHAS. P. WANNALL, *J. P.*

Letter from B. Mackall, Sr., to Quartermaster General Meigs in Same Case.

"WASHINGTON, *March 3rd*, 1866.

Maj. Gen'l Meigs, q'master general.

SIR: During the lifetime of Governor Corwin I employed him individually in behalf of my son, Brooke Mackall, Jr., of this city, who owns the lot on corner of New York avenue & 14th street, occupied by the paymaster general's department, to procure and collect from said department what was due to said Brooke Mackall, Jr., for rent and use of the premises.

Since Governor Corwin's death neither Brooke nor myself, as his agent, has ever recognized any one except Black, Lawon & Co. as attorneys in the premises, as will appear by power of attorney

to them from Brooke Mackall, Jr. Mr. Corwin desired me
239 to allow his partner, Judge Johnson, to assist in the claim, but I refused to allow any one but himself to take charge of it, having confidence in him as an old friend.

Very respectfully,

(Signed) B. MACKALL."

B. Mackall Sr.'s relinquishment of all right, &c., to the amount awarded for the use of the property corner of 14th street and New York avenue, which is also in said case.

"I hereby relinquish all right to and authorize Brooke Mackall, Jr., to receive the amount awarded for use of property on 14th street and New York avenue, as it is his.

(Signed) B. MACKALL.

Witness:

(Signed) L. G. BRANDEBURG.

October 22nd, 1867."

In consequence of which, said Supreme Court during the life of his father affirmed a decree that defendant had an equitable title to the said property.

As to most of the other property mentioned in said deed, it has been very much encumbered by deeds of trust, tax titles, &c., but it was understood and agreed more than 20 years ago that it was to be the property of this defendant, and upon this understanding he has had possession and incurred indebtedness and made improvements from time to time. At different times there have been sales for taxes, and defendant purchased it at such tax sale, one of said deeds at tax sale being in the handwriting of said B.
240 Mackall, Sr. All of the property mentioned in Exhibit "A," in the city of Washington, except lot 7, in square 223, was conveyed to this defendant by C. W. Fairo and others December 21st, 1863, recorded in Liber A. M. H. No. 16, folio 240, in the office of the recorder of deeds, the original deed being in the handwriting of said B. Mackall, Sr.

The said B. Mackall, Sr., during his life executed two wills, one dated August 5th, 1870, and the other July 29th, 1876, both being in his own handwriting and properly witnessed by three witnesses, in each of which he devised to this defendant all the property he had, both real and personal, and defendant says that the said deed of February 27th, 1880, was in pursuance of and to carry out the purpose which he had for more than 20 years, and the verbal agreements he had made from time to time concerning the said property, on account of which this defendant says that he would have been entitled in equity to have had a conveyance thereof decreed even if such conveyance had not actually been made.

And now, having fully answered, the defendant prays that the bill of complainants be dismissed with costs.

B. MACKALL, Jr.

W. WILLOUGHBY,
Sol. for Def't B. Mackall, Jr.

DISTRICT OF COLUMBIA, *ss:*

Brooke Mackall, Jr., being sworn, says that he has read the above answer by him subscribed and knows the contents thereof,
241 and that the facts therein stated upon his personal knowledge are true, and that the facts therein stated upon information and belief he believes to be true.

Sworn to before me this 2nd day of June, A. D. 1882.

R. J. MEIGS, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Decree.

Filed June 28, 1884.

Supreme Court of the District of Columbia, in General Term.

LEONARD MACKALL *et al.*, *vs.* BROOKE MACKALL, JR., *et al.* } Equity. No. 8038.

This cause coming on to be heard at the first instance in general term upon the pleadings, proofs, and proceedings in the cause and having been argued by counsel, on consideration thereof it is this twenty-eight (28th) day of June, 1884, ordered, adjudged, and decreed—

That the deed of Brooke Mackall, Sr., to the defendant Brooke Mackall, Jr., of February 27th, 1880, described in the bill of complaint, shall, as to lot No. 7, in square 223, at the southwest corner of Fourteenth street and New York avenue, in the city of Washington, D. C., and the interests therein described and growing out of the same, operate as a confirmation of the title, legal and equitable, in the said grantee, the defendant Brooke Mackall, Jr., as to
242 all the parties to this suit, and shall stand as a deed of conveyance for such purposes; but as to the remainder of the property described in said conveyance not relating to said lot No. 7, in square 223, the said conveyance shall be, and the same is hereby, adjudged and decreed to be inoperative, null, and void.

And it is further adjudged and decreed that each party shall pay the costs incurred by him or them.

CHARLES C. JAMES, *J.*

Original Bill.

Filed June 7, 1882.

In the Supreme Court of the District of Columbia.

ALFRED RICHARDS and WILLIAM B. WEBB, Trustee, vs. BROOKE MACKALL, JR., and W. WILLOUGHBY, Trustee. } In Equity. No. —.

To the honorable the supreme court of the District of Columbia, holding a special term in equity:

The bill of complaint of Alfred Richards and William B. Webb, trustee, respectfully represents:

1st. That they are citizens of the District of Columbia and residents of the city of Washington, in said District, and that the said Brooke Mackall, Jr., is also a citizen of the said District and a resident of the said city, and that the said W. Willoughby is also a citizen of the said District.

243 2nd. That heretofore, to wit, about the — day of October, 1870, the said Richards purchased at a sale made by the marshal of the District of Columbia that parcel of real estate in the said city of Washington known as part of lot seven (7), in square two hundred and twenty-three (223), said part being described as follows—that is, part of lot seven (7), in square two hundred and twenty-three (223), beginning at the northeast corner of said square and running thence south forty-four (44) feet; thence westerly to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; thence with said north line to the beginning, and that the same was duly conveyed to him by a deed made by said marshal, bearing date the — day of October, 1870, and recorded in Liber 639, f. 140, of the land records of the District of Columbia, and he has always paid the taxes annually assessed against the said part of said lot so by him purchased and the improvements thereon, and that immediately upon such purchase and the delivery of said deed therefore as aforesaid he entered into and took possession of the land so conveyed to him, completed the erection of a building which had been commenced there, and built a fence along the north line of the lot so conveyed to him, caused said lot to be surveyed and subdivided so as to show the part thereof purchased by him, and caused such subdivision to be recorded in the office of the surveyor of the District of Columbia, in accordance with the act of Congress in that case made and provided, and has exercised other acts of ownership in and about the same, all of which will fully appear.

244 3rd. That the said sale so as aforesaid made by the said marshal of the said District of Columbia was made under writs of *fieri facias* issued in execution of certain judgments rendered against the said Brooke Mackall, Jr.; that the proceeds of the said sale were insufficient to satisfy the said judgments, and that the plaintiff Al-

fred Richards, being the owner of the said judgments, filed a bill in this court asking that the remaining portion of the said lot seven (7), in square two hundred and twenty-three (223), might be subjected to the payment of the balance of said judgments, and that a decree was passed by the court upon the hearing of the said bill directing that all that portion of the said lot seven (7), in square two hundred and twenty-three (223), not theretofore sold to complainant, as aforesaid, should be sold by the trustees appointed by the court for that purpose, and the proceeds applied to the payment of the balance due upon the aforesaid executions in the hands of the marshal of the District of Columbia and the taxes and other liens existing against said property; that the said W. B. Webb and W. Willoughby were appointed the trustees under such decree, and that said trustees, as far as the matters and things in this bill are concerned, represent different interests and for that reason are made complainant and defendant, and the said complainant William B. Webb avers that he is informed that the said defendant Brooke Mackall, Jr., has been advised by the said defendant Willoughby, trustee as aforesaid, that he, said Mackall, Jr., is entitled to the possession of the said parts of lots upon which he has entered as aforesaid.

245 4th. That the trustees appointed by the said original decree, to wit, W. B. Webb and Thomas Wilson, the said Wilson having been superseded by said Willoughby, proceeded to make sale of the portion of said lot not sold to the said complainant and did sell the same; that exceptions were filed to said sale upon the ground that the description contained in the said deed from the marshal of the District of Columbia to complainant was uncertain and did not sufficiently determine what part of said lot remained to be sold under the said decree; that the court sustained the said exceptions and proceeded to ascertain and determine what part of said lot was so sold, and after due consideration did decree that the part of the said lot so sold by the marshal and purchased by complainant Alfred Richards was bounded and described as hereinbefore set forth and the trustees aforesaid should proceed to sell all of said lot south of a line drawn from a point on 14th street forty-four (44) feet south of the northeast corner of said square, and running thence westerly to the west line of said lot and parallel with New York avenue; that from this decree an appeal has been prayed to the Supreme Court of the United States, where the matter is still pending and undetermined.

5th. That the said part of the said lot so ordered to be sold is improved by two small frame houses, the rents of which, complainants are informed and believe, are collected by and have always been collected by the said defendant, the said Brooke Mackall, Jr., and are by him applied to his own use and benefit; that arrears

246 of taxes have largely accumulated upon the said property and are now unpaid and are continuing to accumulate, the said defendant, Brooke Mackall, Jr., having failed to apply the rents and profits by him received as aforesaid from the improvements upon the said part of said lot to the payment thereof, and

that by reason of this failure of the said defendant, the said Brooke Mackall, Junior, to pay the said taxes so in arrear or to apply the rents and profits arising from the said improvements towards the payment of the same such accumulated taxes have become a lien upon the said part of lot so ordered to be sold, for which the same is liable at any time to be sold, and that the failure also to apply such rents and profits as the same are collected to the payment encumbers the said property with large penalties, which greatly increase the amount to be paid on account of said taxes; by reason of all of which, and because by the said decree ordering the said property to be sold it is provided that any such sale shall be for the purpose of paying, in addition to the said judgments, all encumbrances that may in any other way be existing thereon at the time of said sale, the security of complainant for the payment of his said several judgments is rendered very uncertain and is greatly decreased.

6th. That complainants are advised that by reason of the accumulation of causes in the Supreme Court of the United States the appeal taken from the order of this court determining the boundaries of the portion of the said lot sold to him by the marshal of the District of Columbia as aforesaid and by that officer conveyed to him and into the possession of which he entered as aforesaid
247 and as incident thereto the portion of the said lot to be sold under the decree of this court as aforesaid cannot be had and decided by that court for a long time; perhaps not for several years; that in the meantime the said defendant, the said Brooke Mackall, Junior, against the protest of complainant, has entered into the said part of the said lot of ground, as well as the said part of lot embraced within the boundaries contained in the said deed from the marshal of the District of Columbia to complainant and confirmed by the order of this court as the part thereof decreed by this court to be sold, and has attempted to exercise acts of ownership over the same and to obtain and maintain control of the same with a view of turning the same to some profit and advantage for himself, and is about, as complainant is informed and believes, and so believing charges, to put other parties into possession thereof, as pretended tenants of his, under lease by him made to such parties for that purpose, either verbally or in writing.

7th. Complainants are advised that they are entitled to the aid of this court to protect them from the wrongful acts of the said defendant, Brooke Mackall, Junior, above referred to and to preserve to him all rights and privileges belonging to him under the circumstances hereinbefore set forth and contained—first, because the trespass committed by the said defendant is a continuing trespass and will inflict irremediable injury upon complainants, for which they can have no adequate remedy at law; second, because the said actings and doings of the said defendant will, if not restrained by the order of this court, lead to a multiplicity of suits, and, third, because, as far as this court is concerned, the boundaries
248 of the part of the said lot seven (7), in square two hundred and twenty-three (223), purchased by complainant from the marshal

of the District of Columbia have been fully determined, and such part of lot is of right the property of complainant until the decision of this court is reversed upon appeal, and because the other portions of the said lot have been decreed to be sold by officers appointed by the court for that purpose and of right are under the control of the court alone and not of the said party defendant.

8th. Forasmuch, then, as the said several actings and doings of the said defendant, Brooke Mackall, Junior, are contrary to equity and good conscience and in fraud an- derogation of the rights of complainants, and that they are without remedy at common law and can only have full and sufficient relief in this court holding a term in equity, said complainant prays as follows:

Prayer.

1st. That he may have the process of the court against said defendants, summoning them to appear in this court, on or before a day therein named, to answer this said complainant's bill and to show cause, if any they have, why a decree should not pass as herein prayed.

2nd. That an order may be passed herein appointing a receiver to take charge of the small houses erected and now standing upon that portion of said lot seven (7), in square two hundred and twenty-three (223), not sold to complainant by the marshal of the District of Columbia and ordered to be sold by the decree of this court, and to collect and receive the rents, issues, and profits arising there-
240 from and apply such rents and profits to the payment of the taxes and assessments now due or that may hereafter become due and payable thereon.

3rd. That an order may be passed by the court enjoining and restraining the said defendant, Brooke Mackall, Junior, or his agents, attorneys, employés, tenants, lessees, or any and all persons acting by, through, or under him or by his appointment or authority in any way from in any way interfering with, taking possession of, controlling, or exercising acts of ownership or proprietorship in and about the said lot seven (7), in square two hundred and twenty-three (223), or any part or parcel thereof, as well the said part heretofore by the said marshal of the District sold to said complainant as the said part ordered to be sold by the decree of this court.

4th. That the complainant may have such other and further relief as, his case considered, may to the court seem just and proper.

And, so as in duty bound, he will ever pray, &c.

ALFRED RICHARDS.
W. B. WEBB, *Trustee.*

W. B. WEBB,
Solicitor for Complainant.

I do solemnly swear that I have heard read the bill by me signed and know its contents, and that the matters stated therein
250 as of my own knowledge are true, and those stated on information and belief I believe to be true.

ALFRED RICHARDS.

Sworn and subscribed to before me this 7th day of June, A. D. 1882.

[SEAL.] HENRY R. ELLIOTT,
U. S. Comm'r for the District of Columbia.

Answer of Brooke Mackall, Jr.

Filed June 12, 1882.

Supreme Court of the District of Columbia.

ALFRED RICHARDS *et al.* }
vs. } Equity. No. 8184.
BROOKE MACKALL, JR., *et al.* }

The defendant Brooke Mackall, Jr., for answer to the bill of complaint filed herein and without waiving his demurrer, says:

1st.

He admits the allegations of the first paragraph, except he says that said W. Willoughby is a resident and citizen of the State of Virginia.

2nd.

For answer to the second paragraph he says that he denies that the said Richards made a valid purchase of the premises therein mentioned, or that a valid sale was made thereof, as therein
251 alleged; but he says that the pretended purchase and sale were made under the circumstances fully set forth in a bill of complaint and exhibits therewith filed by this respondent in the case of Brooke Mackall, Jr., *v.* Alfred Richards & others in this court in equity cause No. 8118, to which reference is made and which will be filed as an exhibit hereto and asked to be made a part of this answer.

Among other numerous and gross irregularities of such pretended sale it will appear and it is true that at the time of such pretended purchase the legal title to such property was in Brooke Mackall, Sr., the father of this defendant, who had, however, prior to that time, for a good consideration, promised to convey the said property to this defendant and had put him into possession thereof. Respondent had incurred certain indebtedness to plaintiff and others in erecting the building thereon known as the Palace market; but as the United States took possession of it and thereby deprived this defendant of the use of it he was unable, in consequence thereof, to meet such indebtedness and was compelled to submit to the taking of judgments against him, among which was a judgment in favor of A. & T. A. Richards for $897.12.

Executions were issued upon such judgments, and at an alleged sale said Richards became the purchaser, claiming that although the legal title was in the father of this defendant and though he was no party to any of such judgments he had by such sale obtained title

to the property. The property levied upon was appraised at $15,000 by appraisers appointed by the marshal and was worth much more, but was bid in by said Richards for $2,500. When he procured the marshal's deed he fraudulently and without warrant of law
252 had inserted in such deed a description of the southerly line of the property alleged to have been sold entirely different from the executions and advertisement of sale or any other proceedings in the causes or any of them, including thereby at least 5,596 feet more than was embraced in any other description, and now claims that he is entitled to the property north of a line running from a point 14 feet south of the northeast corner of said lot westerly and parallel to New York avenue because of the said false description in said marshal's deed.

He further says that said Richards never obtained possession of any part of said premises except by force and without any lawful authority, and he denies that he has ever been in possession of any part thereof except of the building and a small portion of said lot bordering on the south side of said building and enclosed by a fence, but, on the contrary, this respondent has for more than twenty years last past and during all the time since the pretended sale been in the possession of all the said premises except the said building and said small enclosed portion connected therewith.

3rd.

This respondent admits that said Richards with other creditors, whose claims he now claims to have acquired, filed a bill in this court to subject the balance of the lot which remained after such alleged sale to the payment of the portion of the judgments claimed to remain unsatisfied, as alleged in the third paragraph, and that certain decrees were made therein, to which reference is made for an accurate statement thereof, and he admits that he has been advised, as stated, that he is entitled to the possession of the said
253 parts of lot upon which he has entered.

4th.

Respondent admits that sale was attempted to be made by trustees Webb & Wilson and sale was made, to which exceptions were filed, which were sustained on the grounds stated.

Respondent says that, although a decree was made by the special term determining what was the portion of the lot alleged to have been sold and determining that the southern line was a line commencing 14 feet south of the northeastern corner of said lot and running thence parallel to New York avenue to the western boundary of said lot, upon appeal being taken to the general term this decision was not sustained, but a new decree was made directing a sale of the portion of the lot south of such line, but expressly declaring that such decree should be "construed as not determining any question of title to any portion of said lot seven lying north of said line." From the decree of the general term directing such sale an appeal has been taken to the Supreme Court of the United States;

said Richards moved to dismiss such appeal, but such motion was, after argument, denied, and it is still pending. Upon taking such appeal respondent gave, with surety, a bond in the penalty of $500.00, approved by the presiding justice of this court, to indemnify said Richards against all damages arising from the delay caused by said appeal and which operated as a supersedeas and stay of proceedings in said suit. Respondent refers to copy of such bond to be filed as an exhibit herewith and to decrees and proceedings in said cause also to be so filed.

254 5th.

Respondent says that there is upon the premises one frame wooden temporary shanty in which are two shops, one used as a carpenter's shop and one as a plumber's shop, the actual value of which would not exceed $250.00, but, owing to its location, it, together with the ground upon which it stands and in connection therewith, has rented at the rate of $24.00 per month, which, so far as defendant has been able to collect, has been applied principally to his own use.

Respondent has placed improvements upon the said property to the amount of $153.62 within the last month and has made arrangements to and contemplates putting further improvements thereon to the amount of more than $1,000.00.

Defendant denies that the amount of taxes unpaid and chargeable as a lien against said property south of the said disputed line exceeds the sum of $1,500.00, and will produce certificate of collector of taxes as an exhibit herewith.

The said property is worth in the market not less than $30,000, as appears by testimony of Latta and others in depositions made by them filed as exhibits.

An offer of $50,000 has been made within the last 60 days for the said lot No. 7, the buildings to be removed, and in the part claimed by Richards are 6,996 square feet and in the remainder south of said line 8,004 square feet.

The whole indebtedness set forth in the bill No. 2373, as claimed therein, with interest to this note, is $4,951.12, of which the amount of judgments claimed by Richards is $3,181.36, deducting
255 Pepper's judgment, never obtained against defendant & erroneously set forth in the bill, and the Hannan jud't, since paid. For these reasons the respondent denies the allegation of complainant that "the security of complainant for the payment of his said several judgments is rendered very uncertain and is greatly decreased."

6th.

The defendant says that from information and belief he believes that the cause in the Supreme Court of the United States will be reached in a time not exceeding two years.

He denies that the decree appealed from determined the boundaries, as alleged in the 6th paragraph of the bill. Respondent denies that he has in the meantime entered into the part of the lot

within the alleged boundaries of the lot alleged to have been conveyed by the said marshal's deed. On the contrary, he says that he has been in the possession of the said portion, as before alleged, for more than twenty years, said Richards never having been in possession only of the building and a small enclosed portion, before described, of which he obtained forcible possession, as before alleged.

Respondent admits that he has exercised acts of ownership over the same and proposes to "turn the same to some profit and advantage for himself," all of the said lot except that occupied by said Richards having been for many years lying idle and yielding no profit except as hereinbefore stated, and respondent believes that if now taken from him by order of the court it will be almost
256 wholly unproductive, yielding but little, if any, revenue over and above the expenses of the receiver and of the court.

Respondent says that he is advised that the bond which was given upon appeal to the Supreme Court of the United States was and is by law regarded as indemnity against all damages arising from delay caused by said appeal, and that the attempt to procure further security by this indirect method is wholly unwarranted by any law or practice of courts of equity.

Respondent protests against the manifest injustice of depriving him of all means of making the said property productive by taking it out of his hands and depriving him of the use of it when it can be of no possible benefit to the plaintiff.

7th.

Defendant denies that he has committed any trespass, and he denies that he has inflicted any injury upon the complainant, and he denies that he proposed to inflict any such injury; and he further says that he is advised that if he had committed such trespass as alleged the complainant has a complete and adequate remedy at law, and that the purpose of an ejectment suit cannot be accomplished by a bill in equity.

He further denies that his action or proposed action can lead to any just suits as alleged, and he again denies the allegation in the seventh paragraph of the bill that the boundaries of the lot contained within the alleged boundaries of the marshal's deed have been determined, and he denies the right of complainant to any portion of the lot in controversy, and he denies that there has
257 ever been any determination of such right, and he denies the lawful authority of the court to control the possession of the lot decreed to be sold in the face of the supersedeas bond which has been given upon the appeal to the Supreme Court of the United States.

8th.

For a further answer this defendant says that he only desires to put improvements upon the part of the lot in which he is in possession to add to its value in order to make it productive and profitable, and for this purpose he has within the last thirty days made and nearly perfected arrangements for so doing, expecting to imme-

diately expend $1,000 or more in and about said premises; that he intended to put an expensive and valuable fence on 14th street, as he has already on New York avenue, and to put a fountain in and upon said lot, and to fit up all necessary apparatus and appliances for making a first-class summer garden thereon; that he has been advised by men of long experience in such matters that owing to its location and other conveniences at a comparatively small expense very large profits can be realized therefrom during the summer months, and responsible parties have offered large inducements to him to be allowed to engage with him in such an enterprise. In order to be successful in this, he is advised and believes that it is of the first importance that there should be no delay, as the profitable season is during the summer months, which are rapidly passing away.

Defendant says that there has been severe and protracted litigation between the said Richards and this defendant, extending through many years, and said Richards has manifested very hostile sentiments towards this defendant, boasting of his power
258 through his wealth and superior influence to succeed in such litigation; that in April last this defendant filed a bill in equity to set aside the sale and deed of said marshal, and the answer to said bill and the bill in this case were filed simultaneously and with the purpose, as respondent believes as to the bill in this case, not to obtain any benefit therefrom to himself, but to injure and destroy, so far as possible, the interests of this respondent and to prevent him from making his property available, one of the complaints in paragraph 6 of the bill being that this defendant proposed to turn the property "to some profit and advantage for himself." Said complainant was advised of the intention of this defendant to improve this property so as to make it productive, as he himself substantially admits by his bill, and upon becoming so informed he seeks to deprive this defendant of the use of said property and to put it into the hands of the court, where it must be wholly unproductive, and thus to deprive this defendant of the power to make profit therefrom, so that he could pay off the said indebtedness and thus prevent the sale.

Defendant believes and charges that said complainant designs to make such property as unproductive as possible, in order that he may be enabled to purchase in the same at a low price, and for such purpose designs, if possible, to take away from this defendant all power to pay off such indebtedness, and that he hopes to obtain the aid of the court to accomplish this purpose by the bill he has filed in this case.

Defendant says that complainant well knew that he was making the improvement upon New York avenue, but manifested no
259 objection until after its completion, when he employed a colored man to go & destroy it. Hearing of this, defendant went to protect it, whereupon said Richards came himself in person to assist in such destruction. Defendant ordered them to leave the premises, threatening to use sufficient force to eject them, and started towards them for such purpose in a threatening manner

with a little hatchet in his hands, whereupon they with greatly accelerated speed departed, beseeching the forbearance of respondent; but said Richards went from thence to the police court and procured therefrom a warrant for an assault and caused said defendant to be prosecuted in such police court for such assault, but said court, upon the testimony being heard that defendant was in possession and acting only in defense of such possession, promptly dismissed such prosecution; and said Richards, having failed to obtain such possession through the instrumentality of the police court, immediately appealed to a court of equity to obtain it by first getting it into the hands of a receiver, instead of proceeding by seven-day summons or ejectment, as he could easily do if defendant had unlawful possession.

Defendant denies all allegations of the bill inconsistent with the statements herein made, and, having fully answered, prays to be hence dismissed with his costs.

B. MACKALL, JR.

W. WILLOUGHBY,
Solicitor for Defendant.

250 DISTRICT OF COLUMBIA, *ss:*

Brooke Mackall, Jr., being sworn, says: "I do solemnly swear that I have read the answer by me subscribed; I know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true."

B. MACKALL, JR.

Subscribed and sworn to before me June 12, 1882.

R. J. MEIGS, *Clerk*,
By M. A. CLANCY,
Assistant Clerk.

Supreme Court of the District of Columbia.

ALFRED RICHARDS *et al.*
vs.
BROOKE MACKALL, JR., *et al.* } In Equity. No. 8184.

The defendant having fully answered, defendant moves that the restraining order heretofore granted be dissolved, and that the injunction prayed for in complainants' bill be denied.

BROOKE MACKALL, JR.,
By SOL. W. WILLOUGHBY.
W. WILLOUGHBY.

261 *Order Denying Application for Receiver, &c.*

Filed June 12, 1882.

Supreme Court of the District of Columbia.

ALFRED RICHARDS *et al.*
vs.
BROOKE MACKALL *et al.* } Equity. No. 8184.

JUNE 12TH, 1882.

This cause came on to be heard upon the order to show cause why a receiver should not be appointed, and the answer of defendant and affidavits filed herewith *and* the defendant Brooke Mackall, Jr., be enjoined as prayed in the bill; having been argued by counsel, it is ordered, adjudged, and decreed that the said application for receiver & for an injunction be denied, and that the restraining order heretofore made be, and the same is hereby, dissolved.

A. B. HAGNER,
Asso. Justice.

12th June, 1882.

EXHIBIT "A."

This agreement made this tenth day of April 1883 between Brooke Mackall Jr., and Westel Willoughby witnesseth that whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of Alfred Richards and others *vs.* Brooke Mackall & others No. 2373 in equity in the supreme court of the District of Columbia and which is now pending be-
262 fore the Supreme Court of the United States for the defendants in said suit and whereas he is counsel for the plaintiff in the case of Brooke Mackall Jr. *vs.* Alfred Richards & others in equity No. 8118 in the supreme court of the District of Columbia, and he is also counsel for the defendant in the case of Leonard Mackall & others *vs.* Brooke Mackall Jr., No. 8038 in equity in said court.

Now therefore in consideration of the services of said W. Willoughby as such counsel performed and to be performed, he hereby agreeing to conduct the said above-mentioned suit of Richards and others *vs.* Mackall & others, No. 2373 to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall Jr., hereby agrees to allow and pay to him as compensation — to what has already been received by him a sum equal to — per cent. of such sum as may be adjudged to the said B. Mackall, Jr. as aforesaid and which may be recovered in said suit by B. Mackall, Jr., *vs.* A. Richards & others in equity No. 8118 by way of mesne profits, damages and costs provided that if such fifty per cent. be less than $5,000 the said W. Willoughby shall have such sum of $5,000 and the said W. Willoughby shall

have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards and that the above compensation shall be received by said W. Willoughby in full satisfaction for his services in the aforesaid matters in controversy as counsel he to have no other compensation for such services.

It is provided further that if said causes Nos. 8038 & 8118 are not finally determined by the court sitting in special term & an appeal is taken, for such services as may be necessary in appel-
263 late courts, an additional compensation shall be allowed which shall hereafter be *argued* upon by the parties and he shall also be allowed an additional compensation for services in No. 2373 which may be necessary after the decision of the Supreme Court of the United States upon the points now pending therein.

Witness the following signatures and seals in duplicate.

—— ——. [SEAL.]
—— ——. [SEAL.]

Decree Dismissing Original and Cross Bills.

Filed May 29, 1894.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant,
against
BROOKE MACKALL and Others, Defendants. } Equity. No. 12521.

This cause having come on for consideration by the court upon the original bill of complaint as amended and the cross-bill of the defendant Brooke Mackall and the other pleadings and proceedings and the testimony, and having been argued by counsel and considered by the court, it is, this twenty-ninth day of May, A. D. 1894, adjudged, ordered, and decreed that each of the said bills be, and *the* it is hereby, dismissed, but without prejudice to the prosecution of the suit at law now pending in this court between the complainant and the said Brooke Mackall upon the agreement of the tenth day of April, A. D. 1883, mentioned in the said original and cross bills.

W. S. COX, *J.*

264 *Mandate.*

Filed January 24, 1895.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, [SEAL.] Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Westel Willoughby, complainant, and Brooke Mackall, The Mutual Fire Insurance Com-

pany of the District of Columbia, Samuel C. Wilson, trustee, and Leonard Mackall, trustee, and Oliver T. Thompson, trustee, defendants, equity, No. 12521, wherein the decree of the said supreme court entered in said cause on the 29th day of May, A. D. 1894, is in the following words, viz:

"This cause having come on for consideration by the court upon the original bill of complainant as amended and the cross-bill of the defendant Brooke Mackall and the other pleadings and proceedings and the testimony, and having been argued by counsel and considered by the court, it is, this twenty-ninth day of May, A. D. 1894, adjudged, ordered, and decreed that each of the said bills be, and it is hereby, dismissed, but without prejudice to the prosecution of the suit at law now pending in this court between the com-
265 plainant and the said Brooke Mackall upon the agreement of the tenth day of April, A. D. 1883, mentioned in the said original and cross bills.

W. S. COX, *J.*"

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by Westel Willoughby, whereon Brooke Mackall was made appellee, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of January, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that the said complainant, Westel Willoughby, recover against the said defendant, Brooke Mackall, one hundred and twelve dollars and ten cents for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court, with directions to pass a final decree in conformity with the opinion of this court.

January 8, 1895.

266 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Complainant.

Clerk	$31 10
Printing record	81 00
	$112 10

Decree Declaring Debt and Lien, &c.

Filed January 30, 1895.

In the Supreme Court of the District of Columbia, January, 1895.

WESTEL WILLOUGHBY, Complainant, vs. BROOKE MACKALL *et al.*, Defendants. } No. 12521. In Equity.

This cause coming on to be heard upon the bill of complaint and proceedings therein and mandate of the Court of Appeals of the District of Columbia, and it appearing that the defendants The Mutual Fire Insurance Company of the District of Columbia,
267 Samuel C. Wilson, trustees, and Oliver T. Thompson, trustee, have disclaimed all interest in the subject-matter of this cause, and it further appearing that the complainant had dismissed his bill as against the defendant Leonard Mackall, trustee, it is now, this 30th day of January, 1895, ordered, adjudged, and decreed as follows:

That the said Brooke Mackall was indebted to the complainant, Westel Willoughby, at the time of the filing of his bill of complaint herein and is now so indebted in the sum of five thousand dollars, with interest thereon from November 24th, 1884, until the same shall be paid, together with the costs of this suit.

It is further ordered, adjudged, and decreed that the complainant had at the time of the filing of his bill and now has a lien for the said amount so decreed upon all that part of lot numbered seven (7), in square No. 223, in the city of Washington and District of Columbia, lying north of a line beginning at a point forty-four (44) feet south of the northeast corner of said lot on Fourteenth street and running thence parallel to New York avenue to the west line of said lot except the ground upon which the building known as Pabee market stands, and the said property so described is charged as of the date of the filing of the bill of complaint herein with the payment of the said amount of money herein decreed and the costs of suit aforesaid.

It is further ordered, adjudged, and decreed that unless the said sum of money shall be paid to the complainant or his solicitor within sixty days from the date of this decree the said prop-
268 erty so charged with such payment shall be sold at public auction for the purpose of such payment, and that Arthur A. Birney and Henry E. Davis be, and they are hereby, appointed trustees to make such sale. Said trustees shall first give bond in the penalty of $50,000, with surety to be approved by the court, for the

faithful performance of their duty as such trustees and shall then sell the said premises at public auction, after having given at least ten days' notice of the time, place, and terms of sale by publication in the Evening Star. The terms of such sale shall be: Twelve thousand dollars in cash; the balance in three equal instalments, payable respectively in one, two, and three years from the day of sale, *which* interest from such day until paid. Such deferred payments shall be evidenced by the promissory notes of the purchaser and secured by deed of trust on the property sold, and said trustees shall report under oath to the court their proceedings under this decree.

And it is further adjudged, ordered, and decreed that in case said real estate, when sold, shall not realize a sufficient sum to pay and discharge the said debt, interest, and costs, then and in such event the complainant shall have execution as at law — any other property of the defendant for such deficiency as may exist.

And from this decree the defendant in open court appeals to the Court of Appeals of the District of Columbia, and the penalty of the bond on such appeal, which shall act as a supersedeas, is fixed at five hundred dollars.

W. S. COX, *J.*

269 Willoughby } No. 12521.
vs.
Mackall }

The clerk will please enter an appeal from the decree of January 30, 1895, in this cause and issue citation accordingly.

Feb'y 7, 1895.

H. E. DAVIS, *For Def't.*

Appeal entered and citation issued as ordered Feb'y 7, 95.

By the CLERK.

270 In the Supreme Court of the District of Columbia.

Westel Willoughby } No. 12521. In Equity.
vs.
Brooke Mackall }

The President of the United States to Westel Willoughby, Esq., Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal entered in the Supreme court of the District of Columbia on the 7 day of February, 1895, wherein Brooke Mackall is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 7th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this — day of ——, 189–.

——— ———,

Attorney for Appellee.

[Endorsed:] (189.) No. 12521. Equity. Westel Willoughby *vs.* Brooke Mackall. Citation. Issued Feb'y 7, 1895. Served copy of the within citation on within-named appellee Feb'y 16, 1895. Albert A. Wilson, marshal. H. E. Davis, attorney for appellant.

271 *Order Fixing Penalty of Bond on Appeal.*

Filed February 7, 1895.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant, *against* BROOKE MACKALL, Defendant. } Equity. No. 12521.

The defendant having appealed to the Court of Appeals of the District of Columbia from the decree of January 30, 1895, in the above-entitled cause, the penalty of the bond on the said appeal is hereby fixed at five hundred dollars, and the defendant is authorized, in lieu of giving such bond, to deposit in the registry of this court the sum of five hundred dollars, such sum, if given, or deposit, if made, to act as a supersedeas.

W. S. COX, *J.*

Feb. 7, 1895.

1895, February.—$500.00 deposited by appellant in lieu of appeal bond.

272 *Order Extending Time.*

Filed February 21, 1895.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY, Complainant, *against* BROOKE MACKALL, Defendant. } Eq. No. 12521.

On motion of the defendant, appellant, it is this 21st day of February, A. D. 1895, ordered that the time prescribed by rule for the preparation and filing of the transcript of record on appeal be, and it is hereby, extended fifteen (15) days.

W. S. COX, *J.*

Directions to Clerk.

Filed March 6, 1895.

In the Supreme Court of the District of Columbia.

WESTEL WILLOUGHBY
vs.
BROOKE MACKALL *et al.* } In Equity. No. 12521.

To the clerk of the supreme court of the District of Columbia.

SIR: You will please copy the following papers and testimony in the above entitled cause, being so much of the record in said
273 cause as the now appellant deems necessary to constitute the record or transcript for hearing on his appeal:

1. The amended bill of complaint, filed May 2nd, 1892.
2. The demurrer to the said bill, filed May 12th, 1892.
3. The decree of July 13th, 1892, sustaining the said demurrer.
4. The decree of the Court of Appeals of the District of Columbia reversing said decree, filed November 24th, 1893.
5. The disclaimer of certain defendants, filed January 11th, 1894.
6. The discontinuance as to defendant No. 5, filed January 11th, 1894.
7. The answer of defendant Brooke Mackall to the amended bill, filed February 12th, 1894.
8. Replication, filed February 17th, 1894.
9. All the depositions in the case except the portions thereof marked in blue pencil "omit" and the Defendants' Exhibits A & B.
10. The following papers in equity cause No. 2373, as follows: Original bill; answer of Brooke Mackall, Jr.; decree of May 1st, 1873; the decree of July 24th, 1877; the decree of December 11th, 1879; decree of April 5th, 1881; the decree of May 6th, 1885, and abstract of pleadings filed in the general term of the supreme court of the District of Columbia.
11. Brief of W. Willoughby on motion to dismiss appeal in said equity cause No. 2373.
12. Bill, answer, and decree in equity cause No. 8038.
13. Bill, answer, and decree in equity cause No. 8184.
14. Copy of original draft of agreement of April 10th, 1883, with interlineations.
274 15. Decree of May 29th, 1884, dismissing bill and cross-bill.
16. Mandate of Court of Appeals of the District of Columbia, filed January 24th, 1895.
17. Decree of January 30th, 1895, on said mandate.
18. Appeal of the defendant Brooke Mackall, February 7th, 1895, and citation thereon.
19. Order fixing the penalty of bond, etc., on said appeal.
20. Certificate of deposit of amount mentioned in said order.
21. Certificate of clerk.

HENRY E. DAVIS,
Attorney for Brooke Mackall.

275 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 274, inclusive, are true copies of originals in cause No. 12521, in equity, wherein Westel Willoughby is complainant and Brooke Mackall is defendant, as the same remains upon the files and records of said court, as per directions of counsel for appellant.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 29th day of March, A. D. 1895.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk*.

[Endorsed:] District of Columbia supreme court. No. 447. Brooke Mackall, appellant, *vs.* Westel Willoughby. Court of Appeals, District of Columbia. Filed Mar. 30, 1895. Robert Willett, clerk.

276 Court of Appeals of the District of Columbia.

WESTEL WILLOUGHBY, Appellee, *vs.* BROOKE MACKALL, Appellant. } No. 447.

And now comes the appellee, and by his counsel moves that the appeal taken in this case to this court be dismissed upon the following ground, to wit:

The appeal now taken is an appeal from a decree which was rendered upon a mandate from this court to the court below and is in precise accordance with such mandate, and it was a decree finally disposing of the merits of the case and all questions therein.

A. A. BIRNEY,
Attorney for Appellee.

To Henry E. Davis, Esq., counsel for appellant:

Please take notice that on Tuesday, the 16th day of April, 1895, or as soon thereafter as counsel can be heard, I shall call up the above motion before the court.

A. A. BIRNEY,
Att'y for Appellee.

(Endorsed:) Court of Appeals, D. C., April term, 1895. No. 447. Brooke Mackall, appellant, *vs.* Westel Willoughby. Motion to dismiss by appellee. Court of Appeals, District of Columbia. Filed Apr. 11, 1895. Robert Willett, clerk.

277 BROOKE MACKALL, Appellant, vs. WESTEL WILLOUGHBY. } No. 147.

TUESDAY, *April 16th*, A. *D.* 1895.

The motion to dismiss filed in the above-entitled cause by the appellee on April 11, 1895, was ordered to be heard on Thursday, April 18, 1895.

BROOKE MACKALL, Appellant, vs. WESTEL WILLOUGHBY. } No. 147.

THURSDAY, *April 18th*, A. *D.* 1895.

The motion to dismiss the above-entitled appeal was argued by Mr. A. A. Birney in support and by Mr. H. E. Davis in opposition.

278 BROOKE MACKALL, Appellant, vs. WESTEL WILLOUGHBY. } No. 147.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This case has been in this court upon two former appeals. On the last appeal the case was considered on its merits as disclosed in the proof, and this court then made a definitive decision of the questions presented on the record, resulting in a reversal of the decree appealed from, with costs to the appellant, and remanding the cause to the court below, with directions to enter a final decree in accordance with the opinion of this court filed. The decree of this court was duly entered, declaring the decree appealed from reversed, and remanding the cause for the final decree by the court below, in accordance with the opinion. By the opinion and decree thus made, the litigation between the parties was finally terminated on the merits; and the mandate of this court was issued as directed, and the court below passed a final decree in pursuance of that mandate.

It is from that decree that the present appeal is taken. The appellee has moved to dismiss the appeal upon the ground that the present appeal presents no new question for decision, and that the litigation is concluded so far as this court is concerned.

It is not denied, indeed it is conceded by the counsel for the appellant, that the decree from which this appeal is taken was made in strict conformity to the opinion and mandate of this court. And such being the case, the question is, ought the present appeal to be entertained by this court? We do not understand that the case is brought here with any view of attempting to procure from this court a review and reversal of its former opinion and decree. But we are informed by counsel for the appellant that it is deemed material or important that a judgment of affirmance should be entered on this appeal to enable the appellant to take the case to the

Supreme Court of the United States. And while this court is entirely willing to afford any facility in its power to enable parties to exercise the right of appeal to the fullest extent, the present mode of procedure is not deemed proper to that end; and in the opinion of this court the appellee is entitled to have this appeal dismissed.

It is a well-settled principle in the practice of appellate procedure, that an appeal will not be entertained from a decree entered in the court below in exact conformity to the mandate of the appellate court issued in the same case upon a previous appeal. There must be an end for appeals as for all other proceedings; and while it is true that if, in the course of the execution of the decree, after its entry, either party is aggrieved by what may have been done in such execution, he may appeal from the final decree in that behalf; but such an appeal will bring up for review only the proceedings subsequent to the mandate. Stewart *v.* Salamon, 97 U. S., 361. Where such an appeal is taken from a decree passed in pursuance of the mandate of an appellate court, the latter will, upon motion of the appellee to dismiss, simply examine the decree entered by the court below, and if that decree conforms to the mandate sent down, dismiss the appeal with costs. Mackall *v.* Richards, 116 U. S., 45. But if the decree entered below does not conform to the mandate, the case will be remanded with appropriate directions for the correction of the error. Stewart *v.* Salamon, *supra*.

In this case, as we have already stated, the opinion and decree entered by this court on the former appeal made a final end of the litigation, and the rights of the parties on the merits were fully determined and adjudicated. The amount of the claim was adjudged to be due, and that there existed a lien upon specific property as security for its payment; and the direction to the court below to enter the final decree had reference simply to the modal or
279 formal matter for carrying out and executing the adjudication of this court; and when the decree was entered in the court below, being in conformity to the mandate, it became in effect the decree of this court. If, therefore, this appeal were entertained, it would be virtually an appeal from our own decree. This would be an incongruity that ought not to be allowed.

Looking to the right of the appellant to appeal to the Supreme Court, the decree of this court upon which the mandate to the lower court was founded was a final decree for all purposes of an appeal to the Supreme Court of the United States, and that is all that would seem to be necessary for the protection of the rights of the appellant. Mower *v.* Fletcher, 114 U. S., 127. It is not so much to a matter of form as it is to a matter of substance that the Supreme Court looks in determining whether a decree be final or not; and if it be in substance a final determination of the litigation so as to conclude the parties, it is, according to the decided cases, appealable.

The appeal must be dismissed, with costs to the appellee.

Appeal dismissed.

280 BROOKE MACKALL, Appellant, vs. WESTEL WILLOUGHBY. } No. 447.

Appeal from the supreme court of the District of Columbia.

TUESDAY, *April 23d*, A. D. 1895.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and on a motion to dismiss, which was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that this appeal be, and the same is hereby, dismissed with costs.

Per Mr. Chief Justice Alvey, April 23, 1895.

BROOKE MACKALL, Appellant, vs. WESTEL WILLOUGHBY. } No. 447.

WEDNESDAY, *April 24th*, A. D. 1895.

On motion of Mr. Henry E. Davis, attorney for the appellant in the above-entitled cause, it is ordered that an appeal to the Supreme Court of the United States from the decree entered herein by this court on Tuesday, April 23d, be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

281 Know all men by these presents that we, Brooke Mackall, as principal, and Le Roy Tuttle, Jr., and Henry E. Davis, as sureties, are held and firmly bound unto Westel Willoughby in the full and just sum of three hundred dollars, to be paid to the said Westel Willoughby, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Brooke Mackall, as appellant, and the said Westel Willoughby, as appellee, the same being numbered 447, a decree was rendered against the said Brooke Mackall, and the said Brooke Mackall having been allowed in open court, at the same term, an appeal to the Supreme Court of the United States to reverse the said decree in the aforesaid suit, and having duly taken such appeal:

Now, the condition of the above obligation is such that if the said Brooke Mackall shall prosecute his said appeal to effect and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BROOKE MACKALL. [SEAL.]
LE ROY TUTTLE, JR. [SEAL.]
HENRY E. DAVIS. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
M. F. MORRIS,
Associate Justice, Court of Appeals, D. C.

[Endorsed:] No. 147. Brooke Mackall, appellant, *vs.* Westel Willoughby. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 3, 1895. Robert Willett, clerk.

282 BROOKE MACKALL, Appellant, *vs.* WESTEL WILLOUGHBY. } No. 147.

FRIDAY, *May 17th, A. D.* 1895.

On motion of MR. A. A. BIRNEY, attorney for the appellee in the above-entitled cause, it is ordered that the mandate to the supreme court of the District of Columbia issue forthwith.

283 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Westel Willoughby, complainant, and Brooke Mackall, The Mutual Fire Insurance Co. of the District of Columbia, Samuel C. Wilson, trustee, and Leonard Mackall, trustee, and Oliver T. Thompson, trustee, defendants, equity No. 12521, wherein the decree of the said supreme court entered in said cause on the 30th day of January, A. D. 1895, was in favor of the said complainant, Westel Willoughby, and against the
284 said defendant, Brooke Mackall, as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by Brooke Mackall, wherein Westel Willoughby was made appellee by a citation issued and served, agreeably to the act of Congress in such case made and provided, fully and at large appears;

285 And whereas in the present term of April, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and on a motion to dismiss, which was argued by counsel:

On consideration whereof it is now here ordered, adjudged, and decreed by this court that this appeal be, and the same is hereby, dismissed with costs, and that the said complainant, Westel Willoughby, recover against the said defendant, Brooke Mackall, for his costs herein expended and have execution therefor.

April 23, 1895.

286 You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, chief justice of said Court of Appeals, the 17th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Costs of complainant, clerk, paid by def't Mackall.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[Endorsed:] Court of Appeals of the District of Columbia. No. 447. April term, 1895. Brooke Mackall, appellant, *vs.* Westel Willoughby. Mandate.

287 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing is a true and complete transcript of the record and all proceedings in said Court of Appeals in the case of Brooke Mackall, appellant, *vs.* Westel Willoughby, No. 447, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 22d day of May, A. D. 1895.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

167-681

Supreme Court of the United States.

No. ~~274~~ 274.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

ARTHUR A. BIRNEY,
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

On consideration

IN THE

Supreme Court of the United States

No. 614.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

Now comes here Westel Willoughby, the appellee, and moves the Court that the appeal in this cause be dismissed, because he says that the money decreed to be paid to the appellee by the final decree and the costs of the cause have been paid since the taking of said appeal, as will more fully appear by the affidavit of the appellee hereto attached.

ARTHUR A. BIRNEY,
Counsel for Appellee.

DISTRICT OF COLUMBIA, *ss:*

I, Westel Willoughby, being duly sworn, on oath say that I am the appellee in the case of Mackall *vs.* Willoughby, No. 614 on the docket of the Supreme Court of the United States.

I further say that on January 8, 1895, the Court of Appeals of the District of Columbia (before which said cause was then pending upon appeal) rendered an opinion in said cause reciting a decree entered May 29, 1894, by the special term of the supreme court of the District of Colum-

bia, and which decree had dismissed the bill filed by this appellee, and passed an order of reversal of said decree in the following words:

"On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that the said complainant, Westel Willoughby, recover against the said defendant, Brooke Mackall, one hundred and twelve dollars and ten cents for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court, with directions to pass a final decree in conformity with the opinion of this court.

"January 8, 1895."

And thereafter and upon the receipt of the mandate of said Court of Appeals the supreme court of the District of Columbia passed the following decree in conformity with such opinion:

"This cause coming on to be heard upon the bill of complaint and proceedings therein, and mandate of the Court of Appeals of the District of Columbia, and it appearing that the defendants The Mutual Fire Insurance Company of the District of Columbia, Samuel C. Wilson, trustee, and Oliver T. Thompson, trustee, have disclaimed all interest in the subject-matter of this suit; and it further appearing that the complainant has dismissed his bill as against the defendant Leonard Mackall, trustee, it is now, this 30th day of January, 1895, ordered, adjudged, and decreed as follows:

"That the said Brooke Mackall was indebted to the complainant, Westel Willoughby, at the time of the filing of his bill of complaint herein, and is now so indebted, in the sum of five thousand dollars, with interest thereon from November 24, 1884, until the same shall be paid, together with the costs of this suit.

"It is further ordered, adjudged, and decreed that the complainant had at the time of the filing of his bill and now has a lien for the said amount so decreed upon all that

part of lot numbered seven (7), in square 223, in the city of Washington and District of Columbia, lying north of a line beginning at a point forty-four (44) feet south of the northeast corner of said lot, on Fourteenth street, and running thence parallel to New York avenue to the west line of said lot, except the ground upon which the building known as the Palace Market stands, and the said property so described is charged as of the date of the filing of the bill of complaint herein with the payment of the said amount of money herein decreed and the cost of suit aforesaid.

"It is further ordered, adjudged, and decreed that unless the said sum of money shall be paid to the complainant or his solicitor within sixty days from the date of this decree the said property so charged with such payment shall be sold at public auction for the purpose of such payment, and that Arthur A. Birney and Henry E. Davis be, and they are hereby, appointed to make such sale. Said trustees shall first give bond in the penalty of $50,000, with surety to be approved by the court, for the faithful performance of their duty as such trustees, and shall then sell the said premises at public auction, after having given at least ten days' notice of the time, place, and terms of sale by publication in the *Evening Star*. The terms of sale shall be: Twelve thousand dollars in cash, the balance in three equal installments, payable respectively in one, two, and three years from the day of sale, with interest from such date until paid. Such deferred payments shall be evidenced by the promissory notes of the purchaser and secured by deed of trust on the property sold, and said trustees shall report their proceedings under this decree.

"And it is further adjudged, ordered, and decreed that in case said real estate when sold shall not realize a sufficient sum to pay and discharge the said debt, interest, and costs, then and in such event the complainant shall have execution as at law against any other property of the defendant for such deficiency as may exist.

"And from this decree the defendant in open court appeals to the Court of Appeals of the District of Columbia, and the penalty of the bond on such appeal, which shall act as a supersedeas, is fixed at five hundred dollars.

"W. S. Cox, *J.*"

Thereafter and in pursuance of said last-mentioned decree and of a subsequent order substituting Charles C. Tucker as one of the trustees in place of the said Henry E. Davis, the said Arthur A. Birney and Charles C. Tucker as trustees, the money adjudged not having been paid, advertised the property described in said decree to be sold November 29, 1895, for the satisfaction of the said decree.

Thereupon and on November 27, 1895, one Mahlon Ashford, who is a stranger to said record of said cause, paid to affiant, complainant in said cause, the whole amount of money by said decree required to be paid, and all the taxed costs of the cause, and received from affiant a receipt of the tenor following:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

"WESTEL WILLOUGHBY
vs.
BROOKE MACKALL *et al.* } Equity. No. 12521. Docket No. —.

"Received of the Real Estate Title Insurance Company of the District of Columbia, trustee, the sum of eighty-seven hundred and forty-six and $\frac{7}{100}$ dollars ($8,746.07) on account of the decree in the above-entitled cause, and under which decree part of lot numbered seven (7), in square numbered two hundred and twenty-three (223), in the city of Washington, D. C., is now advertised for sale on the 29th day of November, A. D. 1895, and in consideration thereof the said advertisement is withdrawn and the said real estate released from the lien of said decree to the extent of the amount so as above received, the said amount being the full sum decreed by the court in favor of the complainant, with its accrued interest to date and the taxed costs of suit and expenses of advertising.

"A. A. BIRNEY,
"*As Solicitor for Complainant.*

"Approved:
"WESTEL WILLOUGHBY, *Complainant.*"

Affiant thereupon caused said advertisement to be withdrawn, and he has not since that time made any attempt to enforce the said decree, and he makes no claim or demand thereunder, and he does not claim that if by decree of this court such decree of the Court of Appeals should be affirmed he would have any right to any further enforcement of said decree or to collect any money thereon against the appellant, nor does he claim to have any right of lien upon the premises described in said decree, the same having been expressly released.

Affiant further says that at the time such payment was made, as aforesaid, said Mahlon Ashford informed this affiant that he made the same under written authority from said Brooke Mackall, dated July 2, 1894, by which he was empowered as representative of a lienholder upon said real estate to pay and discharge any prior lien thereon, including the demand of this affiant, if at any time said real estate should be advertised for sale for satisfaction of any such prior lien.

Affiant further shows that immediately prior to the making of said payment by said Ashford the appellant, said Brooke Mackall, by his counsel, objected to such payment and protested against the same, but said Ashford did not regard such objections and paid said money.

WESTEL WILLOUGHBY.

Sworn to and subscribed before me this 2nd day of March, 1896.

The pending appeal is from the decree of January 8th, above recited. No appeal has been taken from the final decree of the supreme court of the District of Columbia of January 30th, 1895, which was passed pursuant to the mandate of the Court of Appeals.

Argument.

The payment made by Ashford was not a payment enforced as against Mackall by the decree. He made an agreement more than a year before that if at any time the subsequent lienholder should find the property advertised for sale by virtue of a prior lien, he should at his discretion have the right to pay the amount and take up the lien. He had the right to do this upon the property being merely *advertised*. He was not required to wait until an opportunity could be had to see whether the property was properly advertised or not, or whether the decree under which the advertisement was made would be set aside upon appeal. Mackall might have provided by his agreement that payment should be made only upon an advertisement being made upon a final decree of the court; but he did not. He agreed that upon *any* advertisement being made, whether in pursuance of a proper decree of the court or not, the subsequent lienholder might at once take up the lien for his own benefit. He might have prevented the advertisement by supersedeas bond, if he had chosen to do so; but he did not, but allowed it to be made, thus giving the lienholder the absolute right to take up the lien, so that he could have the first lien. This was a purely voluntary agreement on the part of Mackall, to which the appellant was not a party.

The subsequent lienholder took advantage of the right he had according to this agreement against the protest of the solicitor of Mackall, so that it could not be said under any circumstances that this money was paid to affiant by request of said Mackall after the decree had been made and the property advertised. Even if the decree in this case should be reversed, no order could be made that the appellee should return this money to Mackall. The transaction was between the appellee and Ashford alone and against the protest of the appellant. Whatever questions

may arise as to the propriety of this payment or as to its effect must be between either the appellee and Ashford or between Ashford and Mackall. As between Ashford and Mackall, it was authorized; as between Willoughby and Mackall, there has never been any recognition of the propriety of the payment by Ashford, but, on the contrary, it was protested against, and for that reason he could not under any circumstances recover it from Willoughby, and his only recourse would be against Ashford as having paid it improperly.

Such payment so made by a stranger to the decree, acting under an independent contract, cannot be held to have been enforced by the decree, but must be regarded as a voluntary satisfaction. The appellee having been satisfied in his demands, the case has lost its substance and any questions which might be argued before this Court could have no substantial interest.

ARTHUR A. BIRNEY,
Counsel for Appellee.

17-681

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 274.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY.

BRIEF IN OPPOSITION TO LEAVE TO FILE THE MOTION TO DISMISS THE APPEAL.

HENRY E. DAVIS,
For the Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 614.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY.

BRIEF IN OPPOSITION TO LEAVE TO FILE THE MOTION TO DISMISS THE APPEAL.

This case is before the Court on two appeals, one in the cause as above numbered (614), and the other in cause numbered, as of this term, 630. The former appeal was taken from the decree of January 8, 1895, and the latter from the decree of January 30, 1895. The statement of the appellee in his motion paper (p. 5), that "no appeal has been taken from the final decree of the supreme court of the District of Columbia of January 30, 1895, which was passed pursuant to the mandate of the Court of Appeals," is discreetly enough not made under oath, as the preceding statements are, for it is directly contrary to the truth. This erroneous statement may have

been made inadvertently, notwithstanding that the transcript of record on the appeal was filed in this Court on May 27, 1895 (in cause then numbered 1035 and now numbered 630), and notwithstanding that in opposing a motion to vacate the supersedeas in this cause (then numbered 1017) counsel for the appellant in his brief, on file, informed the Court of the appeal from the decree of January 30, 1895, and the filing of the transcript of record thereon.

The motion in this case seems to be based upon the theory that the voluntary satisfaction of a decree by a third party leaves no substantial question in controversy between the appellant and the appellee. In other words, the appellee insists that the Court will on the motion to dismiss try the question, upon affidavits, whether upon a reversal the appellant would be entitled to restitution. It is submitted with confidence that the Court will not go outside of the record on the motion to dismiss, and, upon affidavits and counter-affidavits, decide a question in the case which has not arisen and which may not arise. But even if under such circumstances the Court would look into the future and decide upon *ex parte* affidavits that in the event of a reversal the appellant would not be entitled to restitution, there is another insurmountable obstacle which would prevent the Court from granting the present motion, and that is that if the decree below shall be reversed by this Court the appellant will be entitled to his costs on appeal. Such would be his clear right whether he would be entitled to restitution or not; but should the present motion to dismiss prevail he would lose his costs, notwithstanding that the decree of the lower court might be unjust and illegal.

But even if the Court should upon the present motion go into the question whether the appellant would, in event of a reversal, be entitled to restitution, it is submitted that under the law such a right would be clearly his. Upon reversal of a judgment or decree upon writ of error or appeal which does not operate as a supersedeas the party against whom it was rendered is to be restored to all that he lost by the first judgment.

See Little *vs.* Bunce, 7 N. H., 485; S. C., 28 American Decisions, 363, and cases cited in notes.

Tidd's Pr. (American notes), p. 1033.

The notice served upon counsel for the appellant in relation to this motion is in the following form:

"Please take notice that [counsel for appellee] shall ask the Supreme Court of the United States *for leave to file* the above motion, &c., on Monday, the 30th day of March, 1896."

Accordingly, what is above set forth purposely avoids any attempt at controverting the affidavit accompanying the motion. Should the Court think proper to grant leave to file the motion, the appellant asks leave also to submit his affidavit showing the real circumstances of the alleged payment of the money decreed, as stated in the appellee's affidavit.

And, finally, it is submitted that the appellee is in no position to ask favor at the hands of the Court. The record shows that as the result of a decree, about the propriety of which two lower courts have differed, and solely because of a failure to effect a *supersedeas* within the prescribed time, he

has become possessed of a large sum of money, supposed to represent professional services rendered by him, a lawyer, to the appellant, his former client. By this motion the appellee, a member of this bar, notifies the Court that, even should it reverse that decree, and thereby declare him not entitled to this money, he means, nevertheless, to keep it.

Respectfully submitted.

HENRY E. DAVIS,
For the Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894

No. 1077. Case 2744.

BROOKE MACKALL, Appellant,

vs.

WESTEL WILLOUGHBY, Appellee.

BRIEF OF APPELLEE ON MOTION TO VACATE SUPERSEDEAS

Statement of the Case.

This was a proceeding in equity instituted by the appellee, as complainant, to have a lien declared in his favor for five thousand dollars and interest from November 24, 1884, upon certain real estate of the defendant, and to enforce the same by sale. The special term of the supreme court of the District of Columbia having dismissed the bill, the complainant appealed to the Court of Appeals of the District of Columbia, which court, on January 8, 1895, reversed the decree of the court below and remanded the cause with instructions to enter a decree in accordance with the opinion then rendered in favor of the complainant for the amount claimed. (Wash. Law Reporter, —.)

On April 24, 1895, one hundred and six days after the decision of the Court of Appeals, and at a subsequent term of that court, an order was entered allowing an appeal to this Court (Rec., —). No appeal was taken or allowed prior to this time. On May 3, 1895, a citation to the appellee was signed by Mr. Chief Justice Alvey, of the Court of Appeals, and on the same day Mr. Justice Morris, of that court, approved a bond for appeal in the sum of $1,000, the terms of approval being "approved and the appeal made a supersedeas." On May 11, and pending a motion in the Court of Appeals to rescind the order of supersedeas, the record was lodged in this Court.

Appellee now moves for an order vacating the supersedeas or declaring the same to be void.

Points and Authorities.

I.

The decree appealed from was made January 8, 1895; the appeal was allowed April 24, 1895, or much more than sixty days, Sundays exclusive, after the decree. For this reason the justice was without power to award a supersedeas upon any conditions.

In *Sage vs. Central R. R. Co., 93 U. S., 412*, the Court say:

"The supersedeas is a statutory remedy. It is only obtainable by a strict compliance with all the requisite conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the Court nor the judges can disregard. If a delay beyond the limited time occurs the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement."

The precise question has been before the Court several times and the statute has always been construed as we contend.

Peugh *vs.* Davis, 110 U. S., 226.
Kitchen *vs.* Randolph, 93 U. S., 86.
Western Air Line Const. Co. *vs.* McGillis, 127 U. S., 776.

In the first cited of these cases the Court said (p. 228):

"To give a justice or judge of the appellate court authority to grant a supersedeas after the expiration of the sixty days, a writ of error must have been issued and served or the appeal allowed *within that time*."

The limitation of sixty days in the statute (Rev. St., sec. 1007) means something. To permit the supersedeas in this case to stand would put it in the power of any judge of a court from which an appeal may be taken to this Court to award a supersedeas *at any time*, however long after the appeal or writ of error.

II.

The order that the bond should operate as a supersedeas is erroneous for the further reason that the bond was for a less sum than the "damages and costs" awarded. The decree awarded complainant five thousand dollars, with interest for more than ten years, while the supersedeas bond was for one thousand dollars.

Sec. 1000 Rev. St.
French *vs.* Shoemaker, 12 Wall., 86, 99.
Stafford *vs.* Union Bank, 16 How., 135.

III.

The statute provides that security, to be given on appeal, shall be taken by the "*justice or judge signing a citation*" (Rev. St., sec. 1000). No authority is given for the taking of security by any other justice of the lower court. The authority conferred may not be delegated.

Nat. Bank of Omaha *vs.* City of Omaha, 96 U. S., 737.
Haskins *vs.* Railway Co., 109 U. S., 106.

On any of these grounds the motion should be granted and the court below relieved of the embarrassment created by this improvident order.

A. A. Birney,
Solicitor for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~Civ~~ 274

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 614.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS.

DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the District aforesaid, personally appeared Brooke Mackall, who, being first duly sworn, deposes and says:

I am the appellant in the above-entitled cause. The facts in relation to the payment mentioned by the appellee in his motion to dismiss and in the affidavit in support thereof are as follows: Prior to the filing of the original bill in the cause, namely, on September 30, 1887, I borrowed of the Mutual Fire Insurance Company of the District of Columbia the sum of forty thousand dollars and secured the same upon the property in controversy. On May 6, 1890, the appellee sued me at law, in cause numbered 30611 in the supreme

court of the District of Columbia, for the sum of twenty thousand dollars for professional services, claimed independently of the covenant sued on in the present cause. The said cause, numbered 30611, having come on for trial, the appellant obtained a verdict and judgment against me for the sum of twelve thousand dollars, with interest from the 6th day of May, A. D. 1890, and costs, and I paid the same in full on August 6, A. D. 1892. In order to pay this judgment I was compelled to make a new loan on the premises and at the same time retire the previous loan of thirty thousand dollars. At the time of making the new loan, the appellee's bill in this cause then pending, I was compelled to enter into an agreement for the retention of a certain portion of the amount borrowed to guard against the possibility of the appellee's obtaining a decree which would give him a lien as of the date of the filing of his original bill, namely, June 3, 1890, and I so arranged with the person making the loan. Thereafter I sold to the American Security and Trust Company of the District of Columbia a portion of the said premises, at the same time applying a part of the proceeds of the sale to the reduction of the then outstanding loan, and in order to give the purchaser a clear title and at the same time secure the remainder of the loan, which in form and effect became a new loan, I was required and compelled to enter into the following agreement:

"Memorandum of agreement made this 24th day of July, A. D. 1895, by and between Brooke Mackall, of the city of Washington, D. C., of the first part, and the Real Estate Title Insurance Company of the District of Columbia, a corporation duly incorporated under the laws of the said District of Columbia, of the second part.

"Whereas, to enable the party hereto of the first part to negotiate the loan of sixty-five thousand dollars ($65,000) secured by deed of trust on part of lot numbered seven (7) in square numbered two hundred and twenty-three (223) in

said city, to Francis H. Smith and Martin L. Kohler, trustees, bearing date July 9th 1895, the party hereto of the second part, at the special instance and request of the party hereto of the first part, has agreed to guarantee the title to said land as vested in said trustees under said trust, against all liens and claims against said real estate, now or hereafter held to be paramount to the lien of said deed of trust (except taxes), and especially against the lien, effect and operation of the decree entered in equity cause numbered 12521, (Willoughby *vs.* Mackall *et al.*) in the supreme court of the District of Columbia, and now pending on appeal to the Supreme Court of the United States;

"And whereas, for the purpose of indemnifying the party hereto of the second part, its successors and assigns, against all loss, cost, damage or expense, it may hereafter sustain, incur, suffer or lay out and expend by reason of its issuance of such guaranty, the said party hereto of the first part, has executed and delivered to the party hereto of the second part, his certain bond of even date herewith and hereto annexed, in the penal sum of ten thousand dollars ($10,000), secured by a second deed of trust of even date with said bond, on said real estate, to George E. Fleming and E. Welsh Ashford, trustees, and has also and in addition thereto, deposited with the party hereto of the second part, the sum of ten thousand dollars ($10,000).

"Now therefore, in consideration of the recited premises it is hereby mutually stipulated, covenanted and agreed by and between the parties hereto of the first and second parts, that if at any time hereafter, and before full satisfaction or discharge of said decree, or release therefrom of said real estate, the said real estate or any part thereof, shall be advertised for sale, or offered for sale, under the aforesaid decree or under any further or other decree, order or other proceedings in the aforesaid cause; or if during the pendency of said proceedings on appeal, and before satisfaction of said

decree, or release therefrom as aforesaid, said real estate, or any part thereof, shall at any time be sold under the provisions of said sixty-five thousand dollars ($65,000) deed of trust, and any purchaser or purchasers under any such sale, shall refuse to accept the title by reason of the pendency of the aforesaid proceedings; or if before satisfaction or discharge of said decree or release therefrom as aforesaid, any purchaser at any sale of said real estate, under said deed of trust, shall make sale of the same or any part thereof, and his or her or their purchaser shall refuse to accept the title by reason of the pendency of said equity proceedings; or if upon a final determination of said proceedings on appeal, the decree in said cause shall be affirmed and the said party hereto of the first part shall fail or refuse for the space of ten days, to satisfy and discharge said decree or any final decree passed in said cause, with all interest and costs; then and in either event, the said party hereto of the second part, its successors or assigns, may forthwith apply the amount of the aforesaid deposit or as much thereof as may be necessary to the satisfaction and discharge of the aforesaid decree, or final decree, with all interest and costs, regardless of any then pending appeal or other proceedings in said cause; and for so doing the said party hereto of the second part, its successors and assigns, shall be, and is hereby released and discharged of and from all further liability and accountability, at law and in equity in respect of the sum or sums so applied; and should the amount of deposit then in the possession of said party hereto of the second part be insufficient to discharge any decree in the said proceedings, and interest and costs, the deficiency may be satisfied by sale forthwith, under the provisions of said deed of trust to said Fleming and Ashford.

"It is further hereby understood, stipulated and agreed by and between the parties hereto that said deposit may be invested, in whole or in part, with the approval of the party

hereto of the second part, in interest-bearing securities, the interest, when collected, to be paid over to said party hereto of the first part, his executors, administrators or duly authorized agent or attorney but that in no event, shall the said parties hereto of the second part be deemed or held accountable or liable either at law or in equity, for any interest on said deposit, excepting as to such as shall be actually collected, nor for or on account of any depreciation or inadequacy of any securities in which the same or any part thereof, may be from time to time invested; and on full satisfaction and discharge of the said decree and any future order or decree passed in the aforesaid cause, with all interest and costs, whatever of said deposit and its accumulations, may remain undisposed of under the stipulations and conditions hereinabove expressed, shall be paid over to said party hereto of the first part, his executors, administrators or duly authorized agent or attorney; and whatever of said real estate may then be subject to the aforesaid deed of trust to Fleming and Ashford, trustee, shall be released.

"It is hereby further stipulated and agreed, by and between the parties hereto, that said party hereto of the first part, his heirs and assigns, shall have the right at any time or times, before the full payment or discharge of said decree, to have releases of said real estate or any part thereof, from the said trusts to Fleming and Ashford, trustees, upon a further deposit with said party hereto of the second part of a sum or sums equal to thirty (30) cents per square foot, of the real estate so released, such sum to be added to the aforesaid deposit, and held, invested and disposed of in manner and form as aforesaid; and should said real estate or any part thereof, be sold under said deed of trust to said Smith and Kohler, trustees, before the aforesaid decree shall be finally satisfied and discharged, and such sale or sales shall be consummated, said trustees or the survivor shall, and they or he, or the trustee acting, are and is hereby authorized

and directed to pay out of any surplus proceeds of such sale or sales, a sum or sums equal to thirty (30) cents per square foot of the property so sold, to be added to the aforesaid deposit, and held, invested and disposed of as aforesaid, and the receipt of said party hereto of the second part for any such sum or sums received, shall be a full release and discharge of said trustees or the survivor, or trustee acting, as to the amount or amounts so received.

"In testimony whereof, the said parties hereto have signed and sealed these presents, the day and year first hereinabove written.

"(Signed) BROOKE MACKALL. [SEAL]

"Signed, sealed, and delivered
in the presence of—

"THE REAL ESTATE TITLE INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA,

"(Signed) By M. ASHFORD, *President.*

"Attest: GEO. E. FLEMING, *Secretary.*"

After this agreement was entered into, and because this Court had vacated the supersedeas of the decree of the Court of Appeals of the District of Columbia of January 8, 1895, and notwithstanding the appeal from the subsequent decree of the Court of Appeals (now numbered 630 on the docket of this Court) and over the protest of the appellant, as is admitted in the affidavit of the appellee (printed page 5), the certain Mahlon Ashford in the said agreement mentioned made to the appellee's solicitor the payment indicated on printed page 4 of said last-mentioned affidavit and took the receipt of which copy is there set forth.

The payment made by the said Ashford was, so far as I

am concerned, involuntary, and the position in which I found myself was brought about by the fact that the complainant did not institute his proceeding until after I had encumbered the premises in controversy, from which fact the situation and consequences above set forth resulted.

BROOKE MACKALL.

Subscribed and sworn to before me this 23d day of April, A. D. 1896.

CHARLES E. RIORDON,
Notary Public.

[SEAL.]

Office Supreme Court U. S.
FILED.
MAY 27 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. ~~1017~~ ~~1111~~ 274.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

Brief for the Appellant in Opposition to the Motion to Vacate the Supersedeas.

HENRY E. DAVIS,
For the Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 1017.

THE LAW ASSOCIATION —OF— PHILADELPHIA.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

Brief for the Appellant in Opposition to the Motion to Vacate the Supersedeas.

I.

STATEMENT OF THE CASE.

In order to a proper consideration of the motion under discussion a fuller statement is necessary than that made in the appellee's brief in support of the motion; and in order to this fuller statement it is further necessary to examine the record in cause No. 1035 in this Court, the transcript of which was filed on the 27th day of May, A. D. 1895, as well as the record in this cause.

Viewing the two records, the case may be thus stated:

On May 12, 1892, the appellee (having previously filed an

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894

No. 1017.

THE LAW ASSOCIATION
OF
PHILADELPHIA

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY, APPELLEE.

Brief for the Appellant in Opposition to the Motion to Vacate the Supersedeas

I.

STATEMENT OF THE CASE.

In order to a proper consideration of the motion under discussion a fuller statement is necessary than that made in the appellee's brief in support of the motion; and in order to this fuller statement it is further necessary to examine the record in cause No. 1035 in this Court, the transcript of which was filed on the 27th day of May, A. D. 1895, as well as the record in this cause.

Viewing the two records, the case may be thus stated:

On May 12, 1892, the appellee (having previously filed an

original bill) filed an amended bill of complaint against the appellant and others in the supreme court of the District of Columbia in the following words and figures:

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

WESTEL WILLOUGHBY *vs.* BROOKE MACKALL, THE MUTUAL FIRE INSURANCE CO. OF THE DISTRICT OF COLUMBIA, SAMUEL C. WILSON, *Trustee*, and LEONARD MACKALL, *Trustee*, and OLIVER T. THOMPSON, *Trustee*.	In Equity. No. 12521.

The complainant, Westel Willoughby, brings this his amended bill filed against the above-named defendants by leave of the court, and says:

First. That on the 10th day of April, A. D. 1883, by an agreement of that date, signed and sealed by both plaintiff and defendant, the said defendant, Brooke Mackall, in consideration of services of complainant as counsel in the case of Alfred Richards and others *vs.* Brooke Mackall and others, No. 2373, in equity, then pending in the Supreme Court of the United States, and in Brooke Mackall and others *vs.* Alfred Richards and others, No. 8118, in equity, and in Leonard Mackall and others *vs.* Brooke Mackall, Jr., No. 8038, in equity, the last two then pending, but not having been heard in the special term of the court, and the said complainant agreeing to conduct the said suit No. 2373 to a determination of the points then pending and the said suits Nos. 8118 and 8038 to hearing in special term, agreed to pay to the complainant for such services a sum equal to 50 per cent. of such sum as might be adjudged to the said B. Mackall, Jr., and which might be recovered in said suit No. 8118 by way of mesne profits, damages, and costs, provided that if such 50 per cent. be less than $5,000 the complainant was to have such sum of $5,000, said compensation to be in full of the said services in No. 2373 up to the decision of the Supreme Court of the United States on the points then pending therein, and services in Nos. 8118 and 8038 up to and including the hearing in the special term, and for these services said complainant was by said

agreement to have a lien upon such property and judgment as might be recovered against the said Alfred Richards. Copy of the said agreement is filed with original bill and prayed to be made a part of this bill as Exhibit "A."

Second. That the complainant performed all the work required of him by the terms of said sealed agreement, and no payment has been made complainant on account of said agreement.

Third. That the equity cause No. 8118, which was a suit by Brooke Mackall against Alfred Richards to set aside a conveyance of the land on which the Palace Market building stands, on lot 7, in square 223, in the city of Washington, D. C., described in said agreement, and to recover mesne profits thereof of over $20,000 received by said Richards, a decree was entered at special term, April 12, 1883, dismissing the bill with costs, which decree was finally affirmed by the Supreme Court of the United States, and there was no recovery of mesne profits in said cause.

Fourth. That equity cause No. 8038 was argued by counsel at special term, in January, 1884, was then certified to the general term to be there heard in the first instance, where a decree was rendered sustaining the title in Brooke Mackall as to all of lot seven (7), square 223, except that part on which the Palace Market building stands, which decree was finally affirmed in the Supreme Court of the United States.

Fifth. Said equity cause No. 2373 was decided in the Supreme Court of the United States, November 24, 1884, upon the points pending therein at the date of said sealed agreement; that the result of the said decision was that the said Brooke Mackall recovered in said cause against the said Alfred Richards all that part of lot seven (7), in square 223, lying north of a line beginning at a point 44 feet south of the northeast corner of said lot, on Fourteenth street, and running thence parallel to New York avenue to the west line of said lot, except the ground upon which the Palace Market building stands, such recovery being of the value of more than $50,000 at the time thereof.

Sixth. Complainant says that the said part of lot seven (7), in square No. 223, not occupied by the Palace Market building, is charged with a deed of trust, executed by the said Brooke Mackall and the defendant Leonard Mackall as trustee on or about November 30, 1887, to secure the

payment of $30,000 and interest thereon from that time, no part of which has been paid, to the Mutual Fire Insurance Company of the District of Columbia, in which deed of trust the defendant Samuel C. Wilson and defendant Oliver T. Thompson are the trustees, holding the legal title, and the said property is heavily incumbered by taxes unpaid. Although said deed of trust is executed by the said Leonard Mackall, named as defendant, he did not then have and has not now any title, legal or equitable, to the said property. The said deed of trust is recorded in Liber No. 1291 of the land records of the District of Columbia, at page 356, &c., and is prayed to be made a part of this bill of complaint.

Prayers.

First. The complainant prays that Brooke Mackall, The Mutual Fire Insurance Company of the District of Columbia, Samuel Wilson, trustee, Oliver T. Thompson, trustee, and Leonard Mackall, trustee, may be made parties defendant hereto, and that proper process of subpœna may issue, commanding them to appear and abide by the orders and decrees of the court in this cause.

Second. That decree be made herein that the said defendant, Brooke Mackall, is indebted to the complainant in the sum of $5,000, with interest thereon from November 24, 1884, and that the part of the said lot seven (7), in the square 223, described herein in paragraph 5, be charged with the payment thereof.

Third. That discovery be made of the amount due and unpaid upon the said deed of trust to the said Mutual Fire Insurance Company of the District of Columbia.

Fourth. That a decree may be passed for the sale of the said lot seven (7), in square 223, outside of that part upon which the building known as the Palace Market building stands, under the direction of the court and by an officer or officers appointed thereby, and that the proceeds of such sale be applied to the payment of the costs and expenses of the sale, and then to the payment of the liens existing thereon, including whatever may be due under the said deed of trust and which may then remain unpaid, and then to the payment of the said sum of $5,000, with the interest as herein

claimed, besides costs, the balance to be disposed of as the court may direct.

Fifth. That the complainant may have such other and further relief as the nature of the case may require.

A. A. Birney,
Sol. for Complainant.

The object of this bill, as is seen, was to procure a decree adjudging the appellant to be indebted to the appellee in the sum of $5,000 and interest, declaring the same a lien upon a specific piece of real estate, and directing a sale of the real estate to pay the indebtedness.

The supreme court of the District of Columbia dismissed the bill, but on appeal that action was reversed by the Court of Appeals of the District of Columbia, the judgment of the latter court being in the following words (printed Record, 3):

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that the said complainant, Westel Willoughby, recover against the said defendant, Brooke Mackall, one hundred and twelve dollars and ten cents for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court, with directions *to pass a final decree* in conformity with the opinion of this court.

January 8, 1895.

Counsel for the appellant in the court below being at first in doubt, because of the relations of the Court of Appeals to the supreme court of the District of Columbia and to this Court, whether this decree would be considered as final for the purposes of an appeal, out of abundant caution caused the following (which is omitted from the so-called record printed by the appellee) to be entered in the office of the clerk of the Court of Appeals:

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WESTEL WILLOUGHBY	In Equity. No. 12521.
vs.	Calendar, 361.
BROOKE MACKALL.	

And now comes the defendant, by his solicitor, and moves the court to allow an appeal in this cause from the decision of this court to the Supreme Court of the United States, and fix the amount of the appeal bond to be executed by the defendant to perfect the appeal.

H. E. DAVIS,
Sol. for Def't,
By RIDDLE & DAVIS,
Att'ys & Sols.

(Endorsed:) Court of Appeals D. C., January term, 1895. No. 361. Westel Willoughby, appellant, *vs.* Brooke Mackall. Motion for allowance of appeal to Sup. Court U. S. Court of Appeals, District of Columbia. Filed Jan. 23, 1895. Robert Willett, clerk.

The date of this, January 23, 1895, is within fifteen days of the date of the decree.

On January 30, 1895 (the mandate of the Court of Appeals having gone down), the supreme court of the District of Columbia passed the decree which is on pages 147–8 of the record in No. 1035. By this decree, *for the first time in the progress of the cause*, the appellant was *by formal decree* declared indebted to the appellee and to have a lien therefor and the property to which the lien attached ordered sold.

At this point counsel for the appellant in the court below, conceiving that the decree of the Court of Appeals of January 8, 1895, was not final in the sense of being appealable (because it did not leave the cause in such a condition that in case of affirmance by this Court the *Court of Appeals* would have nothing to do but to execute the decree which *it* had *entered*—Grant *vs.* Phenix Ins. Co., 106 U. S., 429;

Dainese *vs.* Kendall, 119 U. S., 53; Fowler *vs.* Hamill, 139 U. S., 549; Lewisburg Bank *vs.* Shefley, 140 U. S., 145—especially as it was a decree of reversal remanding the cause to the lower court to do something which the Court of Appeals itself refrained from doing, namely, *enter a final decree* (Smith *vs.* Adams, 130 U. S., 167), did not at this point go further in the matter of the appeal from the decree of the Court of Appeals, but appealed to that court from the decree of the supreme court of the District of Columbia of January 30, 1895. (Record in No. 1035, p. 148.)

On motion of the appellee, the Court of Appeals dismissed this appeal upon the ground that the decree of the supreme court of the District of Columbia was merely one in obedience to the mandate (*id.*, 152–'4.) From this action the appellant duly appealed to this Court and gave a bond, which is in form and effect a *supersedeas*, being for damages and costs. (*Id.*, 154–'5.)

At the same time, out of abundant caution, counsel for the appellant procured an allowance of the appeal in this cause, No. 1017 (printed Record, I), and the appellant gave the bond in controversy on the motion under discussion. (*Id.*, 4, 5.)

II

Argument.

1. The first contention in support of the motion is that the appeal was not allowed within sixty days.

The answer is:

a. An appeal is a matter of right, and, if prayed, must be allowed.

The Douro, 3 Wall., 564, 566.

Brandies *vs.* Cochrane, 105 U. S., 262.

b. The appeal was prayed within fifteen days, and the allowance relates back and is considered as made on that day.

Latham *vs.* U. S., 131 U. S., App., xcvii.

2. It is next contended that the bond is for an amount less than the recovery in the cause.

But the suit being to establish a lien, and therefore one in which "the property in controversy necessarily follows the event of the suit," it is within the purview of Rule 29 of this Court, and the action of the justice approving the bond is final.

Rule 29 of this Court.

Jerome *vs.* McCarter, 21 Wall., 17.

Mexican, &c., Co. *vs.* Reusens, 118 U. S., 49.

Especially is this contention not entitled to consideration in view of the fact that, as the bill alleges, the appellee's alleged debt is only $5,000 and interest, and the property upon which he claims it to be a lien is worth more than $50,000.

3. Finally, it is contended that the bond was approved by a justice other than the justice who signed the citation.

But in appeals in the District of Columbia this is no objection.

Richards *vs.* Mackall, 113 U. S., 539.

Act creating the Court of Appeals of the District of Columbia, sec. 8, which provides that appeals from that court to this are to be taken "in the same manner and under the same regulations as heretofore provided for in cases * * * in the supreme court of the District of Columbia."

In conclusion, it is respectfully urged that in view of the fact that this cause, as presented by the two records,

brings for the first time before this Court for its consideration the question of the proper method of procedure in appealing to this Court from a decree of the Court of Appeals of the District of Columbia reversing one of the supreme court of the District, without the entry of a formal decree capable of execution *proprio vigore* and according to its terms without further order or decree, the case presented is entitled to oral argument on the motion submitted, and the same is prayed accordingly.

Respectfully submitted.

HENRY E. DAVIS,
For the Appellant.

Supreme Court, U. S.
FILED
APR 17 1897
JAMES H. McKENNEY,
CLERK.

167681

Supreme Court of the United States.

OCTOBER TERM, 1897.

Nos. 274, 281.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY.

HENRY E. DAVIS,
For the Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Nos. 274, 281.

BROOKE MACKALL, APPELLANT,

vs.

WESTEL WILLOUGHBY.

These cases are presented for hearing as one on the Record in No. 281. Certain portions of the Record in No. 274, which are not contained in the Record in No. 281, are printed as an appendix hereto, together with the two opinions of the Court of Appeals of the District of Columbia, hereinafter referred to. These opinions are to be found respectively in 1 App. D. C., 411, and 5 App. D. C., 162.

I.

STATEMENT OF THE CASE.

This is an appeal from the Court of Appeals of the District of Columbia. The appellee filed his original bill (not in the Record) and afterward his amended bill (Rec., p. 1) in the supreme court of the District of Columbia against the appellant and others, setting forth that on the 10th day

of April, A. D. 1883, the appellant and the appellee entered into an agreement, which is set forth on page 144 of the Record, and which is in the following words and figures:

"This agreement made this 10th day of April 1883, between Brooke Mackall Jr. and Westel Willoughby, witnesseth:

"That whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of Alfred Richards and others *vs.* Brooke Mackall and others No. 2373, in equity, in the supreme court of the District of Columbia, and which is now pending before the Supreme Court of the United States, for the defendants in said suit, and whereas he is counsel for the plaintiff in the case of Brooke Mackall Jr. *vs.* Alfred Richards and others, in equity No. 8118 in the supreme court of the District of Columbia and he is also counsel for the defendant in the case of Leonard Mackall and others *vs.* Brooke Mackall Jr. No. 8038, in equity in said court.

"Now, therefore, in consideration of the services of said W. Willoughby as such counsel, performed and to be performed, he hereby agreeing to conduct the said above-mentioned suit of Richards and others, No. 2373, to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall Jr., hereby agrees to allow and pay to him as compensation for such services, in addition to what has already been received by him, a sum equal to fifty per cent. of such money as may be adjudged to the said B. Mackall Jr. as aforesaid, and which may be recovered in said suit of Brooke Mackall Jr. *vs.* Richards and others, in equity No. 8118, by way of mesne profits, damages and costs, provided, that if such fifty per cent. be less than $5,000, the said W. Willoughby shall have such sum of $5,000, and the said W. Willoughby shall have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards; and the above compensation shall be received by the said W. Willoughby in full satisfaction for his services in the aforesaid matters in controversy as counsel, he to have no other compensation for such services.

"It is provided further, that if said causes Nos. 8038 and 8118, are not finally determined in the court sitting in special term, and an appeal is taken, for such services as may

be necessary in appellate courts an additional compensation shall be allowed, which shall hereafter be agreed upon by the parties, and he shall also be allowed an additional compensation for services in No. 2373, which may be necessary after the decision of the Supreme Court of the United States upon the points now pending therein.

" Witness the following signatures and seals in duplicate.

" B. MACKALL, JR. [SEAL.]
" W. WILLOUGHBY. [SEAL.]"

The bill alleges, as the meaning of this agreement, that the appellant agreed, in consideration of services of the appellee in certain causes in equity in the supreme court of the District of Columbia, numbered respectively 2373, 8118, and 8038,—the last two then pending, but not having been heard in the special term of the court, and the appellee agreeing to conduct No. 2373 to a determination of the points pending at the date of the agreement and Nos. 8118 and 8038 to hearing in special term,—that he, the appellant, would pay the appellee for such services a sum equal to 50 per cent. of such sum as might be adjudged to the appellant and which might be recovered in said suit numbered 8118 by way of mesne profits, damages, and costs, *provided* that if such 50 per cent. should be less than $5,000 the appellee was to have such sum of $5,000, said compensation to be in full of his services in No. 2373 up to the decision of the Supreme Court of the United States on the points then pending therein and services in No. 8118 and 8038 up to and including the hearing in the special term; and that for those services the appellee " was by said agreement to have a lien upon said judgment and property as might be recovered against [one] Alfred Richards." (Rec., pp. 1, 2.)

The bill proceeds then to allege that the appellee performed all the work required of him by the terms of the agreement, and that no payment had been made him on account thereof; that cause numbered 8118 was a suit by the appellant against the said Alfred Richards to set aside a

conveyance of the land on which the Palace market building stands, in the city of Washington, D. C., and to recover mesne profits thereof of over $20,000 received by said Richards, in which cause a decree was rendered, which was ultimately affirmed by this Court, dismissing the bill with costs, and there was no recovery of mesne profits in said cause; that in cause No. 8038 a decree was rendered and finally affirmed by this Court sustaining the title of the appellant as to all of lot 7, square 223, in the city of Washington, District of Columbia, except that part on which the Palace Market building stands; that cause No. 2373 was decided in this Court November 24, 1884, upon the points pending therein at the date of the agreement, the result of the decision being that the appellant recovered in said cause all that part of lot 7, in square 223, lying north of a certain line running parallel with New York avenue from the point of beginning to the west line of said lot, except the ground upon which the Palace Market building stands, and that such recovery was of the value of more than $50,000 at the time thereof. (Rec., pp. 2, 3.)

The remainder of the bill relates to matter since become immaterial.

The material prayers of the bill are that the appellant be decreed indebted to the appellee in the sum of $5,000, with interest from November 24, 1884; that the parts of the said lot 7, in square 223, described in the bill, be charged with the payment thereof; and that a decree might be passed for the sale of said lot, outside of that part upon which the Palace Market building stands, and the proceeds thereof, after payment of costs and prior liens, applied to the payment of the sum of $5,000, with interest, as claimed in the bill, besides costs. (Rec., p. 3.)

To this bill the appellant demurred, and on July 13, 1892, the demurrer was sustained and the amended bill ordered dismissed (Rec., pp. 4, 5). On appeal to the Court of Appeals of the District of Columbia the decree of the supreme

court of the District of Columbia was, on November 24, 1893, reversed and the cause remanded to the said supreme court for further proceedings not inconsistent with the opinion of the Court of Appeals (Rec., p. 5). This opinion is the one reported in 1 App. D. C., 411. (App., p. 7.)

Thereupon the defendant answered the amended bill (Rec., pp. 6–12). The answer admits the execution of the agreement of April 10, 1883, and admits as substantially true the allegations respecting causes Nos. 8118 and 8038. Then, admitting that cause No. 2373 was decided in this Court on November 24, 1884, upon the points pending therein at the date of the agreement, the answer contends that the result of the decision was that the appellant, according to the true meaning, intent, and purpose of the agreement, or in any proper sense, recovered no property in said cause against the certain Alfred Richards therein mentioned. (Rec., p. 7.)

The remainder of the answer purports to set forth the relations of the appellant and appellee as client and counsel from the month of July, 1877, and certain alleged conduct of the parties in respect of entering into the agreement in question and certain conduct subsequent thereto. The material features of this portion of the answer are the allegation (Rec., p. 8, folio 13) that the agreement was prepared by the appellee while in his relation as counsel to the appellant, and that the appellee stated to the appellant, who accordingly fully believed, that the meaning and effect of the agreement was intended to be and was such that if there should be recovered in the said cause No. 8118 by the appellant nothing by way of mesne profits, damages, or costs, the appellee was to receive nothing under the agreement except in accordance with the last paragraph thereof, which provides for services in the appellate courts in causes numbered 8038 and 8118, and for whatever services might be found necessary in cause numbered 2373 after

the decision of this Court upon the points pending herein at the date of the agreement; and that after the action of this Court in the last-mentioned cause, and on the 6th day of June, A. D. 1890 (Rec., p. 10, par. 9), the appellee sued the appellant in assumpsit in law cause numbered 30611 in the supreme court of the District of Columbia for legal services rendered the appellant in divers causes, suits, and business, including services as counsel in said cause numbered 2373, for which the appellee claimed $5,500; in said cause numbered 8038, for which he claimed $5,000, and in said cause numbered 8118, for which he claimed $2,500; and that the appellee recovered of the appellant in said law cause numbered 30611 a verdict for $12,000, with interest from May 6, 1890, and costs, for which sum judgment was rendered against the appellant, and he paid and satisfied the same in full on, to wit, August 6, 1892; and the answer claims the rendition and payment of this judgment under the circumstances as *res judicata* against the appellee.

The answer further sets up (Rec., p. 11, par. 10) that, according to the true intent and meaning of the agreement of April 10, 1883, the certain judgment and property contemplated to be recovered against Richards were the judgment and property to be recovered against him in cause numbered 8118 and no other, and that the property involved in cause numbered 2373 was not nor was any part thereof recovered against Richards.

The other portions of the answer not above noted are not deemed material on this hearing.

Replication was duly filed to the answer (Rec., p. 13) and testimony taken; whereupon, on May 29, 1894, upon hearing on the pleadings and testimony, the supreme court of the District of Columbia (Rec., p. 145) dismissed the bill. This decree, on appeal to the Court of Appeals, was reversed on January 8, 1895, and remanded to the supreme court of the District of Columbia, with directions to pass a final decree in

conformity with the opinion of the Court of Appeals (Rec., p. 145). This is the opinion reported in 5 App. D. C., 162. (App., p. 10.)

It is at this point in the record that the extracts printed in the appendix from the Record in number 274 appear. The portions so printed in the appendix are preceded in the record by the second opinion of the Court of Appeals, which for convenience is printed towards the end of the appendix in connection with the first opinion. The portions of the Record in 274, thus printed in the appendix, show an appeal to this Court from the decree of the Court of Appeals of January 8, 1895, duly perfected on May 3, 1895, and a citation thereupon duly issued and served.

Intermediate between the opinion of the Court of Appeals on January 8, 1895, and the perfecting of the appeal therefrom, the mandate of the Court of Appeals having issued on the 24th of January, 1895 (Rec., p. 145), a decree was passed by the supreme court of the District of Columbia on January 30, 1895, in conformity with the opinion and mandate of the Court of Appeals (Rec., pp. 147, 148). From this decree, in turn, the appellant appealed to the Court of Appeals (Rec., p. 148, fol. 268 *ad fin.*), and perfected his appeal on February 7, 1895 (Rec., p. 149). On motion of the appellee, this appeal was dismissed by the Court of Appeals on April 23, 1895 (Rec., p. 154), for the reasons stated in the opinion of the Court of Appeals (Rec., pp. 152, 153). And, finally, from this last action of the Court of Appeals the pending appeal in number 281 was taken on April 23, 1895. (Rec., pp. 154 to 156.)

Since the lodgment of the record in this Court a motion was made by the appellee to dismiss the appeal in No. 274, which motion was by the Court postponed for consideration to the hearing on the merits. This motion is considered at the close of the brief.

II.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In not dismissing the amended bill of complaint.

2. In reversing the decree of the supreme court of the District of Columbia sustaining the appellant's demurrer to the amended bill of complaint and dismissing the said bill.

3. In decreeing that the appellant was indebted to the appellee in the sum of five thousand dollars, or in any sum.

4. In decreeing that the appellant was entitled to a lien upon a certain part of lot 7, square 223, in the city of Washington, District of Columbia.

5. In decreeing that the appellee was entitled to any relief against the appellant in the premises.

III.

ARGUMENT.

1. In order to an intelligent apprehension of the case it is necessary at the outset to understand the situation of the three causes mentioned in the agreement at the date thereof.

No. 8038 may be dropped from consideration, as it is not alleged or claimed that the lien now asserted had anything to do with that case. In fact, Richards was not a party to it, so that nothing could be recovered against him therein.

Cause No. 8118 failed, so that no question of lien as to any property therein concerned can possibly arise. But the cause is nevertheless of the first importance in our consideration, as the appellant's contention and the finding of the supreme court of the District of Columbia is that the lien

contemplated was to be upon the property, if any, recovered in that cause and upon such property only. The opinion of that court is printed in the appendix (p. 14) and is adopted as part of this brief.

The appellee's sole contention now is that the property to be recovered in cause No. 2373 was in the contemplation of the parties, and that there was recovered in that cause of Alfred Richards certain property, and that to that the lien attaches.

It is necessary, therefore, that we first ascertain what these two causes (Nos. 2373 and 8118) were and what they involved.

Lot 7, square 223, is at the southwest corner of 14th street and New York avenue, in the city of Washington. It is irregular in shape, a diagram of it being printed in the Record (118). On the portion indicated by the letters B, C, D, H, was erected a building now known as the Palace market. Richards furnished material for this building and asserted a mechanic's lien upon it and the lot on which it stands. In the assertion of this lien (16) a sale was had in 1870 (22), and the marshal making the sale gave Richards, who was the purchaser thereat, a deed, describing the property sold as follows: "Beginning at the northeast corner of said square and running thence south forty-four feet, thence *westerly* to the west end of the lot, thence in a northerly direction *with the west line thereof* to the north line of said lot, then with said northerly line to the place of beginning" (118). In the cause in which this sale was made no question was ever raised as to the propriety of this description or its meaning. (23, fol. 41.)

Cause No. 2373 was a judgment creditors' bill filed against Mackall by several creditors, including Richards, having for its object the subjection to sale for the satisfaction of the complainants' judgments of all of the lot No. 7 "not before sold by the marshal of the District of Columbia" to Rich-

ards, and asserting that (though the legal title was not in him), Mackall had such an equitable interest therein as rendered it liable to the satisfaction of such judgments (114, fol. 206). Mackall answered the bill, *denying that he had such interest.* (*Ibid.*)

On May 1, 1873, the court adjudged and decreed as follows: "That the title to the said real estate in the proceedings in the said cause mentioned—that is to say, to all of lot numbered seven, in square numbered two hundred and twenty-three, in the city of Washington, *not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards*—is vested in the defendant Brooke Mackall, Jr.," and that the same should be sold to satisfy the judgments, &c. (110, fol. 198.)

Under this decree a sale was made, and Mackall excepted thereto. His exceptions were sustained, the court saying that "before sale can be made of said property the amount to be sold must be definitely ascertained by some proper legal procedure" (111, fol. 200). This was on July 24, 1877.

There followed a reference to a special auditor to ascertain and report the true boundaries of the portion "heretofore sold," and he reported, giving his reasons, that it was impossible for him to ascertain the boundaries. (121.)

Exceptions to this report were sustained by the court in special term, December 11, 1879, in a decree concluding as follows:

"And the court, proceeding to determine the said boundaries in accordance with the said order of July 24th, 1877, does further order that the trustees under the said decree shall sell in accordance with the terms and provisions thereof all that portion of the said lot seven, in square 223, in the city of Washington, lying south of a line drawn from a point on the line of Fourteenth street [forty-four feet south of the northeast corner of said lot and running thence] northwestwardly [southwestwardly] and parallel with New York avenue to the west line of the said lot seven. *This order is made without passing upon the validity of the said marshal's sale.*" (112.)

The portion of the lot thus ordered to be sold is that included in the diagram on page 118, within the letters A, C, D, G. As to this, the court in general term affirmed the decree for sale, adding: "*This decree to be construed as not determining any question of title to any portion of said lot seven lying north of said line.*" (113; and see, generally, appellee's testimony, 21–25.)

Had the case stopped here, the effect of the court's action would be manifest: it decreed the title to all of the lot outside of the quadrangle indicated to be in Mackall and ordered it sold to satisfy the judgments against him; as to the portion within the quadrangle, it left the title to that to be contested as might be seen fit. Now, assuming that the complainants had not appealed (as they did not), the effect as to them would have been that the part outside of the quadrangle would have been sold, they would have been paid, and they would have had nothing to say, and no right to say anything, about the quadrangle. On the other hand, assuming that Mackall had not appealed, the effect as to him would have been that (unless he paid the judgments), he would have lost by sale the part outside of the quadrangle, and have been left free to try the question of title to the quadrangle.

This decree of the general term was made April 5, 1881. Mackall appealed to this Court. As is above shown, the object of this appeal could have had no possible reference to the quadrangle, for there was no decision against him as to that; his appeal must have had reference exclusively to the part of the lot outside of the quadrangle. And Mackall's position in this respect was exactly the same in respect of appealing from the decree of the special term of December 11, 1879. *In the interval between these two decrees, viz., on December* 11, 1880, *the first contract for fees between the appellant and the appellee was made.* (90.)

What was the situation at that date? No. 2373 was still

pending, and, in addition, there had been instituted a suit at law in ejectment, No. 19635. This suit, as stated in the Record (120, fol. 217), grew out of the suggestion contained in the decree or order of July 24, 1877, that the proper boundary lines of what had been sold to Richards "must be definitely ascertained by some proper legal proceeding." The suit was not, however, instituted in the name of the appellee, but in the name of "Leonard Mackall, trustee of Brooke Mackall, against Alfred Richards" (90): a fortunate fact for the appellee; because, as will be dwelt upon hereafter, this first agreement mentions both equity cause No. 2373 and the ejectment suit, law No. 19635, and the provision for the appellant's compensation and lien is confined to the latter: "A sum equal to twenty-five per cent. of such sum as may be adjudged to the said *Leonard Mackall*, trustee as aforesaid, or which may be recovered *in said ejectment suit* by way of mesne profits and costs, and the said W. Willoughby shall have a lien *therefor* upon said judgment as may be recovered against said Alfred Richards." (*Ibid.*)

Returning now to equity No. 2373, this Court in deciding Mackall's appeal held, not that the court below was wrong in decreeing a sale of all of the lot outside of the quadrangle A, C, D, G, but that it should have included in its decree a portion of that quadrangle; for, said the Court, the part sold to Richards in the mechanic's lien proceeding was only the part of the lot upon which the Palace market stands, viz., the interior quadrangle B, C, D, H (15, fol. 27; 113, fol. 204). This was on November 24, 1884 (*Ibid*). The report of the case as decided in this court is in 112 U. S., 369.

The end of this suit, No. 2373, was that Mackall paid the judgment creditors and there was no sale of any part of the lot to satisfy them. (23–'4, fol. 42.)

Nothing appears to have been accomplished by lawsuit No. 19635, in ejectment. On April 11, 1882 (Appellee's Brief below, p. 13), cause No. 8118 in equity was instituted. The object of this suit was to recover possession of the part of lot 7 that had been sold to Richards by the marshal in 1870, and also to recover damages for the mesne profits during the time that Richards had been in possession—the suit was, in effect, an equitable ejectment (24, fols. 42–'3). One of the grounds of this suit was the invalidity of the marshal's sale and deed because of the difficulty about the description, and the result of the suit, if successful, would have been that Mackall would have recovered possession of the part of the lot upon which the Palace Market building stands and damages for its occupation by Richards. (24, fol. 43.)

The covenant in suit was made April 10, 1883 (apparently, and in fact), after the ejectment suit had failed and its place had been taken by equity suit No. 8118. Remembering the provisions of the earlier agreement of December 11, 1880, it is manifest that the new agreement made no change in the old, except to substitute the equity suit No. 8118 for the law cause No. 19635. This will be made abundantly clear by setting forth in parallel columns the vital provisions of the two agreements, the differences being indicated by italics:

1880.	1883.
Whereas the said W. Willoughby has been for [a] considerable period acting as counsel in the case of Richards and others *vs.* Brooke Mackall and others, No. 2373, in equity in the supreme court of the District of Columbia, for the defendants in said suit, and whereas he is also counsel for the plaintiff in the case of *Leonard Mackall, trustee of Brooke Mackall*, against Alfred Richards in *ejectment No. 19635 at law, in said court, the beneficial interest in which is now claimed by the said Brooke Mackall, Jr.*	Whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of *Alfred* Richards and others *vs.* Brooke Mackall and others, No. 2373, in equity in the supreme court of the District of Columbia, *and which is now pending before the Supreme Court of the United States*, for the defendants in the said suit, and whereas he is counsel for the plaintiff in the case of *Brooke Mackall, Jr., vs.* Alfred Richards *and others, in equity, No.* 8118, *in the supreme court of the District of Columbia.*
Now therefore in consideration of the services of said W. Wil-	Now therefore in consideration of the services of said W. Wil-

loughby as such counsel, performed and to be performed, he hereby agreeing to conduct the *said controversies to a final determination* to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow him as compensation for such services, in addition to what has already been received by him, a sum equal to *twenty-five* per cent. of such sum as may be adjudged to the said *Leonard Mackall, trustee* as aforesaid, *or* which may be recovered in said *ejectment* suit by way of mesne profits and costs, and the said W. Willoughby shall have a lien therefor upon said judgment as may be recovered against said Alfred Richards. (90.)

loughby as such counsel, performed and to be performed, he hereby agreeing to conduct the *above-mentioned suit of Richards and others, No. 2373, to a final determination and adjudication by the court of last resort* to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow *and pay to* him as compensation for such services, in addition to what has already been received by him, a sum equal to *fifty* per cent. of such money as may be adjudged to the said *B. Mackall, Jr.*, as aforesaid, *and* which may be recovered in said suit *of Brooke Mackall, Jr., vs. Richards and others, in equity No.* 8118, by way of mesne profits, *damages* and costs, *provided that if such fifty per cent. be less than* $5,000, *the said W. Willoughby shall have such sum of* $5,000, and the said W. Willoughby shall have a lien therefor upon said judgment *and property* as may be recovered against the said Alfred Richards. (144–5.)

It is thus seen at a glance that the subject-matter of the contemplated lien was to be the fruit of that "proper legal proceeding" suggested by the order of July 24, 1877, and which took the form, first, of the ejectment suit, and then of the suit No. 8118, in equity.

What is said to the contrary by the Court of Appeals in its opinion on the demurrer (App., 7) is explained by Mr. Justice Cox in his opinion, and also by mere reference to the allegations of the bill, which, on the demurrer, were alone before the court. Thus it is said in paragraph 5 of the bill (2) that the result of the decision in No. 2373 was that Mackall "recovered in the said cause" against Richards a specified part of lot 7, square 223, of more than the value of $50,000. On the hearing of the demurrer this was accepted as a fact. It is also stated in paragraph 4 of the bill that in No. 8038 Mackall's title to the larger part of the lot was sustained.

In its opinion the Court of Appeals said (App., 9):

"The contract recites the three cases in which are involved the whole of lot 7, in square 223, and No. 8118 is the last one upon the docket in the order of institution. The larger part of the lot was involved in the *two* other cases and the value of that which was *recovered therein* amounted to about $50,000."

Now, the lien was to be upon property recovered from Richards, and it turns out, on the testimony, that Richards was not a party to No. 8038, and that in No. 2373, as above shown, nothing was recovered, as the recovery of nothing was in issue. This Court is, therefore, on the present record free from embarrassment by what was said by the Court of Appeals on the demurrer, in the absence of the real facts as shown by the testimony.

2. It is objected that the appellant put in evidence certain briefs of the appellee filed by him, as the appellant's counsel, in No. 2373; and it was said on the argument below that they are incompetent as "being in the nature of parol statements of what was in his mind some years before the agreement was drawn or executed," and also as being nothing but arguments for a certain purpose.

But it happens that the principal one of these briefs was filed December 7, 1881, within four days of one year *after* the first agreement was made and one year, four months and three days *before* the second agreement. The date of this brief and the brief itself are not in the record, but the brief is on file in this Court, with the date of filing stamped thereon. A second brief was filed November 5, 1884, one year and nearly seven months *after* the *second* agreement. (124, fol. 134*m*.)

These briefs are clearly admissible as throwing light upon the intention of the parties, which is the main thing to be ascertained.

In the brief of 1884 the appellant said as to No. 2373:

"The *sole* controversy was, as shown by the answer, and all the proceedings, and the decree itself, whether the said remainder of the lot was the property of B. Mackall, Sr., or whether B. Mackall, Jr., had an equitable interest therein, subject to the lien of such judgments. The *only* point adjudged by the decree was 'that the title to the said real estate . . . is vested in the defendant, Brooke Mackall, Jr.' The decree adjudges *nothing else*. . . . When, however, the trustees appointed to make the sale attempted to do so . . . a new question was then first presented, and that was, *What was the property described in the decree* and which they had been directed to sell?" (118–119.)

. . . "The bill in this case was a mere creditors' bill, and presented *only* the question whether the appellant had an equitable interest in the balance of the lot not sold by the marshal. *There was no suggestion of any controversy as to boundaries.*

"The submission of such a question, too, entirely changed the relations of the parties to the suit. It presents a question between Alfred Richards alone and the Mackalls. The other judgment creditors have no interest in common with him. On the contrary, their interests are adverse to the claim, for it is for their interest that the property to be subjected to the payment of their judgments should embrace this ground in controversy. In fact the claim of Alfred Richards as owner is adverse to and incompatible with his interest as a judgment creditor, in which character alone he brought his suit. He thus sought, by this incidental inquiry, a determination of his ownership of the valuable property in dispute in direct antagonism to his interest as a judgment creditor and to the interests of his co-complainants without a suggestion of his claim in the bill or written allegation to which issue might be taken or without making the holder of the legal title a party, a proceeding we claim to have been in plain violation of the necessary and well-established rules of practice of courts of equity, if not, indeed, wholly beyond the jurisdiction of a court of equity." (120, 121, fols. 217, 218.)

All this is very true and very sound: it is a conclusive argument against the proposition that No. 2373 had for its

object, or one of its objects, the recovery of anything against Alfred Richards; and the force of it lies in the fact that it must have been in the minds of both the appellant and the appellee at the time of making the covenant in controversy; and this force is very much strengthened by the fact that the appellant had, in the meanwhile, brought for the appellee two distinct suits, one at law and one in equity, to recover the very thing now contended by the appellant to have been recoverable in No. 2373. Is it too strong an expression to say that it would be monstrous that an attorney, who had thus by word and deed advised his client that a given thing was not recoverable in a given suit and had procured from him an agreement in the face of such advice, should now be heard to contend that that very thing was recoverable and recovered in that same suit? And can an attorney be heard to say that such advice, so given, is not to be received as evidence of what he and his client meant in coming into an agreement in relation to fees for services in such case?

And after the agreement was made the appellant still said in his reply brief of 1884: "The original decree, affirmed by this court, decides nothing except the equitable title of appellant, and that there should be a sale." This brief also is not in the record, but is on file in this Court. And when did the appellant herein first contend to the contrary? Manifestly, not until after No. 8118, on which he relied, had been decided adversely by this Court—January 8, 1888. (Appellee's Brief below, p. 13.)

3. The demurrer to the bill of complaint was properly sustained by the supreme court of the District of Columbia, and the Court of Appeals was in error in overruling the decree of the former court in that behalf.

The bill alleges (Rec., p. 2) that in cause No. 8118 there was no recovery of mesne profits; that in cause No. 8038 the title in the defendant Brooke Mackall to a certain part of lot 7, square 223, in the city of Washington, was sustained,

and that as a result of the decision in cause No. 2373 the said defendant "recovered" against the said Richards a certain other part of the said lot, although, as has already appeared, Mackall was a *defendant* in the said last-mentioned suit. And the bill prays that the part of the lot involved in cause No. 8038 be charged with payment of the appellee's claim, but that the part involved in cause No. 2373 be sold to satisfy such claim; in other words, that one part of the lot be charged with a lien, and that a second part, including the first, be sold in satisfaction thereof (Rec., pp. 2, 3). And this, notwithstanding that each of said parts excludes the only part of said lot involved in the cause No. 8118, viz: "that part on which the Palace Market building stands." (Rec., p. 2, par. 3.)

That the demurrer was properly sustained seems almost too plain for argument.

a. The compensation (in addition to that already received), to be received by the complainant was exclusively contingent upon recovery in cause No. 8118: it was to be a sum equal to fifty per cent. of such recovery. There cannot be fifty per cent. of nothing, and it must be assumed as beyond controversy that the meaning of the parties was that there should be something of which a per cent. could be predicated. The language of the agreement is, in terms, that the compensation is to be a percentage *of money, adjudged* and *recovered* in suit No. 8118. The proviso in case this percentage should fall below a certain sum does not alter the understanding: in any case there was to be a recovery. And yet there was none.

The case is made all the plainer by the provision for a lien: such lien was to be upon "said *judgment*," which judgment was to be "recovered *against* the said Alfred Richards." In what case could a *money* judgment be recovered *against*

Alfred Richards? Cause No. 8118 was the only cause in which Richards was defendant, and in which *money* was sought to be recovered against him. It was, therefore, the only cause in respect of the fruits of which a lien was provided for or contemplated, and this fact makes it doubly certain that the appellee's compensation was to be contingent; contingent upon the recovery of that in respect of which a lien might be asserted.

It was contended below that the appellee did not mean to run the chance of losing compensation for all of his services in the three cases on the mere contingency of recovery in one of them. The short answer to this is, first, that the agreement means only what it says; and, secondly, that the agreement acknowledges compensation already received, and it is not in the least improbable that, in view of the amount thus already received, the appellee was willing to continue his services on such contingency. At any rate, the agreement so reads; and the agreement is to be read most strongly against the appellee.

Dealings between attorney and client are carefully and jealously regarded by courts. This jealous care and scrutiny over such transactions extends to all gifts, conveyances and *contracts* by the client, and all securities given by him pending the relation. An attorney must show that the client acted freely and understandingly. And any and every ambiguity is to be resolved in favor of the client and not in favor of the attorney drawing the contract during the relation.

1 Am. & Eng. Encyc. of Law, 959, 960 and cases cited.
Weeks on Attorneys, 441, 450, 451.

b. But even assuming the appellee entitled to some compensation in the premises, he has no standing in equity.

It cannot be denied or questioned that the appellee's standing in equity depends upon his having a lien and a right to its assertion. He could not come into equity for a

decree which would be in effect only a judgment for money. On a claim for such judgment he would have a full, adequate, and complete remedy at law. His supposed right to a lien is, therefore, his only claim for the intervention of equity. And he has no such right.

(1) As already shown, his lien was to be in respect of a recovery in the cause No. 8118. Not only was it necessary to his lien that something should be recovered in that cause, but also the contemplated lien was provided to be only upon the judgment and property recovered in that cause. There being no such recovery, there could, of course, be no lien.

In the brief below for the appellee it was contended that the lien was to be upon property "recovered" in cause No. 2373, as well as in cause No. 8118; and that as certain property was "recovered" in the former cause, the lien must attach to it.

To this there is a fourfold answer: First, the language of the agreement is specific that the lien was to be upon what might be recovered in cause No. 8118; secondly, there was no property "recovered" in cause No. 2373; thirdly, there was no recovery of the only "property" in the possible contemplation of the parties as a subject of lien, viz: the propert involved in cause No. 8118; and, fourthly, the bill does not pray a sale of the property involved in cause No. 2373 (described in par. 5 of the bill), but of a larger property.

(*a*) It has already abundantly appeared that that upon which the appellee was to have a lien, if any there should be, was to be "said judgment and property" in cause No. 8118. The property involved in that cause was "the land on which the Palace Market building stands, on lot 7, in square 223, in the city of Washington D. C." (Rec., p. 2, par. 3); to set aside a *conveyance* of which (in other words to *recover* which), was the primary object of the cause.

(*b*) Cause No. 2373 was not for the "recovery" of any property "against the said Alfred Richards." That cause was a judgment creditor's suit against Mackall, in which there had been several sales of the appellant's property which were set aside, until, finally, a sale was had which was confirmed; and this last sale was of a smaller portion of the property than was at first offered. To say that the difference between the amount of land originally sold and that finally sold was "recovered against the said Alfred Richards" is a misuse of language so gross as to border upon the absurd.

(*c*) As already stated, there was no recovery of or on account of the property involved in cause No. 8118. The primary object of that cause was to set aside a conveyance of (*i. e.*, to recover), a specific part of the lot 7. This suit was lost, and the appellant has never recovered the property in question or anything on account thereof, whether by way of mesne profits or otherwise.

(*d*) The property involved in the cause No. 2373 was *that part* of lot 7 lying north of a certain line, "*except* the ground upon which the Palace Market building stands" (Rec., p. 2, par. 5). The prayer of the bill is for a sale of *all* of lot 7 "outside of that part upon which the building known as the Palace Market building stands." (Rec., p. 3, prayer 4.)

(2) The appellee has no standing in equity for the further reason that his claim of lien does not identify the property to which it is supposed to attach.

It is indispensable to a lien created by convention of parties that the property to be charged must be clearly identified or described.

3 Pomeroy's Eq. Jur., sec. 1235.
Munday *vs.* Munson, 40 Hun., 304.
Drake *vs.* Taylor, 6 Blatchf., 14.

The mere fact that there is room for argument of the question what property was intended to be charged is fatal to the claim of lien. That this room for argument exists, even under the averments of the bill of complaint, is abundantly clear. What, then, shall we say when we look back of the bill to the agreement supposed to create the lien? There is absolutely no mention of any property in that agreement. Several suits are mentioned, but no property. The only possible subject of recovery mentioned is "such money as may be adjudged to" the defendant (appellant) herein "and which may be recovered in said suit . . . in equity No. 8118." The subsequent provision that the complainant (appellee) "shall have a lien therefor upon *said* judgment *and property* as may be recovered *against the said Alfred Richards*" does not help in the least; for there is no "*said* . . . property" to which any possible reference can be supposed to be had.

Finally, it is to be noted that while the appellee sets up a covenant for the sum of $5,000, as he claims, he fails wholly to show when that sum is claimed to have become due. He asserts no demand upon the appellant, but only that "no payment has been made the complainant (appellee) on account of said agreement" (Rec., p. 2, par. 2). Yet he prays a decree that the appellant is indebted to him "in the sum of $5,000, with interest thereon from November 24, 1884," the date of final disposition of cause No. 2373, not of cause No. 8118.

The explanation of this is that (although the appellee may not under the covenant claim any interest), he falls back, of necessity, upon his wholly untenable position that cause No. 2373 is, at the last, the basis of his claim against the appellant.

4. The motion to dismiss No. 274 requires but brief consideration.

a. The motion seems to be based upon the theory that the voluntary satisfaction of a decree by a third party leaves no substantial question in controversy between the appellant and the appellee. In other words, the appellee insists that the Court will on the motion to dismiss try the question, upon affidavits, whether upon a reversal the appellant would be entitled to restitution. It is submitted with confidence that the Court will not go outside of the record on the motion to dismiss, and, upon affidavits and counter-affidavits, decide a question in the case which has not arisen and which may not arise. But even if under such circumstances the Court would look into the future and decide upon *ex parte* affidavits that in the event of a reversal the appellant would not be entitled to restitution, there is another insurmountable obstacle which would prevent the Court from granting the motion, and that is that if the decree below shall be reversed by this Court the appellant will be entitled to his costs on appeal. Such would be his clear right whether he would be entitled to restitution or not; but should the present motion to dismiss prevail he would lose his costs, notwithstanding that the decree of the lower court might be unjust and illegal.

But even if the Court should upon the motion go into the question whether the appellant would, in event of a reversal, be entitled to restitution, it is submitted that under the law such a right would be clearly his. Upon reversal of a judgment or decree upon writ of error or appeal which does not operate as a supersedeas the party against whom it was rendered is to be restored to all that he lost by the first judgment.

See Little *vs.* Bunce, 7 N. H., 485; S. C., 28 American Decisions, 363, and cases cited in notes.

Tidd's Pr. (American notes), p. 1033.

b. The circumstances of the alleged satisfaction of the decree below, upon which the motion is based, are fully set

forth in the appellant's affidavit in opposition to the motion at the time it was filed. This affidavit was filed April 24, 1896, and is as follows:

"DISTRICT OF COLUMBIA, *ss:*

"Before me, a notary public in and for the District aforesaid, personally appeared Brooke Mackall, who, being first duly sworn, deposes and says:

"I am the appellant in the above-entitled cause. The facts in relation to the payment mentioned by the appellee in his motion to dismiss and in the affidavit in support thereof are as follows: Prior to the filing of the original bill in the cause, namely, on November 30, 1887, I borrowed of the Mutual Fire Insurance Company of the District of Columbia the sum of thirty thousand dollars and secured the same upon the property in controversy. On May 6, 1890, the appellee sued me at law, in cause numbered 30611 in the supreme court of the District of Columbia, for the sum of twenty thousand dollars for professional services, claimed independently of the covenant sued on in the present cause. The said cause, numbered 30611, having come on for trial, the appellant obtained a verdict and judgment against me for the sum of twelve thousand dollars, with interest from the 6th day of May, A. D. 1890, and costs, and I paid the same in full on August 6, A. D. 1892. In order to pay this judgment I was compelled to make a new loan on the premises and at the same time retire the previous loan of thirty thousand dollars. At the time of making the new loan, the appellee's bill in this cause then pending, I was compelled to enter into an agreement for the retention of a certain portion of the amount borrowed to guard against the possibility of the appellee's obtaining a decree which would give him a lien as of the date of the filing of his original bill, namely, June 3, 1890, and I so arranged with the person making the loan. Thereafter I sold to the American Security and Trust Company of the District of Columbia a portion of the said premises, at the same time applying a part of the proceeds of the sale to the reduction of the then outstanding loan, and in order to give the purchaser a clear title and at the same time secure the remainder of the loan, which in form and effect became a new loan, I was required and compelled to enter into the following agreement:

'Memorandum of agreement made this 24th day of July, A. D. 1895, by and between Brooke Mackall, of the city of Washington, D. C., of the first part, and the Real Estate Title Insurance Company of the District of Columbia, a corporation duly incorporated under the laws of the said District of Columbia, of the second part.

'Whereas, to enable the party hereto of the first part to negotiate the loan of sixty-five thousand dollars ($65,000) secured by deed of trust on part of lot numbered seven (7) in square numbered two hundred and twenty-three (223) in said city, to Francis H. Smith and Martin L. Kohler, trustees, bearing date July 9th 1895, the party hereto of the second part, at the special instance and request of the party hereto of the first part, has agreed to guarantee the title to said land as vested in said trustees under said trust, against all liens and claims against said real estate, now or hereafter held to be paramount to the lien of said deed of trust (except taxes), and especially against the lien, effect and operation of the decree entered in equity cause numbered 12521 (Willoughby *vs.* Mackall *et al.*) in the supreme court of the District of Columbia, and now pending on appeal to the Supreme Court of the United States;

'And whereas, for the purpose of indemnifying the party hereto of the second part, its successors and assigns, against all loss, cost, damage or expense, it may hereafter sustain, incur, suffer or lay out and expend by reason of its issuance of such guaranty, the said party hereto of the first part, has executed and delivered to the party hereto of the second part, his certain bond of even date herewith and hereto annexed, in the penal sum of ten thousand dollars ($10,000), secured by a second deed of trust of even date with said bond, on said real estate, to George E. Fleming and E. Welsh Ashford, trustees, and has also and in addition thereto, deposited with the party hereto of the second part, the sum of ten thousand dollars ($10,000).

'Now therefore, in consideration of the recited premises it is hereby mutually stipulated, covenanted, and agreed by and between the parties hereto of the first and second parts, that if at any time hereafter, and before full satisfaction or discharge of said decree, or release therefrom of said real estate, the said real estate or any part thereof, shall be adver-

tised for sale, or offered for sale, under the aforesaid decree or under any further or other decree, order, or other proceedings in the aforesaid cause; or if during the pendency of said proceedings on appeal, and before satisfaction of said decree, or release therefrom as aforesaid, said real estate, or any part thereof, shall at any time be sold under the provisions of said sixty-five thousand dollars ($65,000) deed of trust, and any purchaser or purchasers under any such sale, shall refuse to accept the title by reason of the pendency of the aforesaid proceedings; or if before satisfaction or discharge of said decree or release therefrom as aforesaid, any purchaser at any sale of said real estate, under said deed of trust, shall make sale of the same or any part thereof, and his or her or their purchaser shall refuse to accept the title by reason of the pendency of said equity proceedings; or if upon a final determination of said proceedings on appeal, the decree in said cause shall be affirmed and the said party hereto of the first part shall fail or refuse for the space of ten days, to satisfy and discharge said decree or any final decree passed in said cause, with all interest and costs; then and in either event, the said party hereto of the second part, its successors or assigns, may forthwith apply the amount of the aforesaid deposit or as much thereof as may be necessary to the satisfaction and discharge of the aforesaid decree, or final decree, with all interest and costs, regardless of any then pending appeal or other proceedings in said cause; and for so doing the said party hereto of the second part, its successors and assigns, shall be, and is hereby released and discharged of and from all further liability and accountability, at law and in equity in respect of the sum or sums so applied; and should the amount of deposit then in the possession of said party hereto of the second part be insufficient to discharge any decree in the said proceedings, and interest and costs, the deficiency may be satisfied by sale forthwith, under the provisions of said deed of trust to said Fleming and Ashford.

'It is further hereby understood, stipulated, and agreed by and between the parties hereto that said deposit may be invested, in whole or in part, with the approval of the party hereto of the second part, in interest-bearing securities, the interest, when collected, to be paid over to said party hereto of the first part, his executors, administrators, or duly au-

thorized agent or attorney, but that in no event, shall the said parties hereto of the second part be deemed or held accountable or liable either at law or in equity, for any interest on said deposit, excepting as to such as shall be actually collected, nor for or on account of any depreciation or inadequacy of any securities in which the same or any part thereof, may be from time to time invested; and on full satisfaction and discharge of the said decree and any future order or decree passed in the aforesaid cause, with all interest and costs, whatever of said deposit and its accumulations may remain undisposed of under the stipulations and conditions hereinabove expressed, shall be paid over to said party hereto of the first part, his executors, administrators or duly authorized agent or attorney; and whatever of said real estate may then be subject to the aforesaid deed of trust to Fleming and Ashford, trustees, shall be released.

'It is hereby further stipulated and agreed, by and between the parties hereto, that said party hereto of the first part, his heirs and assigns, shall have the right at any time or times, before the full payment or discharge of said decree, to have releases of said real estate or any part thereof, from the said trusts to Fleming and Ashford, trustees, upon a further deposit with said party hereto of the second part of a sum or sums equal to thirty (30) cents per square foot, of the real estate so released, such sum to be added to the aforesaid deposit, and held, invested and disposed of in manner and form as aforesaid; and should said real estate or any part thereof, be sold under said deed of trust to said Smith and Kohler, trustees, before the aforesaid decree shall be finally satisfied and discharged, and such sale or sales shall be consummated, said trustees or the survivor shall, and they or he, or the trustee acting, are and is hereby authorized and directed to pay out of any surplus proceeds of such sale or sales, a sum or sums equal to thirty (30) cents per square foot of the property so sold, to be added to the aforesaid deposit, and held, invested, and disposed of as aforesaid, and the receipt of said party hereto of the second part for any such sum or sums received, shall be a full release and discharge of said trustees or the survivor, or trustee acting, as to the amount or amounts so received.

'In testimony whereof, the said parties hereto have signed

and sealed these presents, the day and year first hereinabove written.

'(Signed) BROOKE MACKALL. [SEAL.]

'Signed, sealed, and delivered
in the presence of—

THE REAL ESTATE TITLE INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA,

'(Signed) By M. ASHFORD, *President.*

'Attest: GEO. E. FLEMING, *Secretary.*'

"After this agreement was entered into, and because this Court had vacated the supersedeas of the decree of the Court of Appeals of the District of Columbia of January 8, 1895, and notwithstanding the appeal from the subsequent decree of the Court of Appeals (now numbered 630 [281] on the docket of this Court) and over the protest of the appellant, as is admitted in the affidavit of the appellee (printed page 5), the certain Mahlon Ashford in the said agreement mentioned made to the appellee's solicitor the payment indicated on printed page 4 of said last-mentioned affidavit and took the receipt of which copy is there set forth.

"The payment made by the said Ashford was, so far as I am concerned, involuntary, and the position in which I found myself was brought about by the fact that the complainant did not institute his proceeding until after I had encumbered the premises in controversy, from which fact the situation and consequences above set forth resulted."

The motion to dismiss No. 274 should be denied, and the decree below in each of the causes (Nos. 274 and 281) should be reversed.

Respectfully submitted.

HENRY E. DAVIS,
For the Appellant.

APPENDIX.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WESTEL WILLOUGHBY, *Appellant*, *vs.* BROOKE MACKALL.	No. 361.	January Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court with directions to pass a final decree in conformity with the opinion of this court.

Per Mr. Justice SHEPARD.

JANUARY 8, 1895.

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WESTEL WILLOUGHBY *vs.* BROOKE MACKALL.	In Equity.	12521, Calendar 361.

And now comes the defendant, by his solicitor, and moves the court to allow an appeal in this case from the decision of this court to the Supreme Court of the United States, and fix the amount of the appeal bond to be executed by the defendant to perfect the appeal.

H. E. DAVIS,
Solicitor for Defendant,
By RIDDLE & DAVIS,
Attorneys and Solicitors.

(Endorsed:) Court of Appeals, D. C., January term, 1895. No. 361. Westel Willoughby, appellant, *vs.* Brooke Mackall. Motion for allowance of appeal to Sup. Court U. S. Court of Appeals, District of Columbia. Filed Jan. 23, 1895. Robert Willett, clerk.

THURSDAY, *January* 24, *A. D.* 1895.

WESTEL WILLOUGHBY, *Appellant*,
vs.
BROOKE MACKALL. } No. 361.

On motion of Mr. Arthur A. Birney, attorney for the appellant, it is this day ordered that the mandate in the above-entitled cause to the supreme court of the District of Columbia issue forthwith.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Westel Willoughby, complainant, and Brooke Mackall; The Mutual Fire Insurance Co. of the District of Columbia; Samuel C. Wilson, trustee, and Leonard Mackall, trustee, and Oliver T. Thompson, trustee, defendants, equity, No. 12521, wherein the decree of the said supreme court entered in said cause on the 29th day of May, A. D. 1894, is in the following words, viz:

"This cause having come on for consideration by the court upon the original bill of complaint as amended and the cross-bill of the defendant, Brooke Mackall, and the other pleadings and proceedings and the testimony, and having been argued by counsel and considered by the court, it is, this twenty-ninth day of May, A. D. 1894, adjudged, ordered, and decreed that each of the said bills be, and it is hereby, dismissed, but without prejudice to the prosecution of the suit at law now pending in this court between the complainant and the said Brooke Mackall upon the agreement of the tenth day of April, A. D. 1883, mentioned in the said original and cross bills.

W. S. COX, *J.*"

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by Westel Willoughby, whereon Brooke Mackall was made appellee, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas, in the present term of January, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel;

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that the said complainant, Westel Willoughby, recover against the said defendant, Brooke Mackall, one hundred and twelve dollars and ten cents for his costs herein expended and have execution therefor; and it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court with directions to pass a final decree in conformity with the opinion of this court.

JANUARY 8, 1895.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Complainant.

Clerk	$31 10
Printing record	81 00
	$112 10

(Endorsed:) Court of Appeals of the District of Columbia. No. 361. January term, 1895. Westel Willoughby, appellant, *vs.* Brooke Mackall. Mandate.

WEDNESDAY, *April* 24, *A. D.* 1895.

* * * * * * *

WESTEL WILLOUGHBY, *Appellant*,
vs.
BROOKE MACKALL. } No. 361.

On motion of Mr. Henry E. Davis, attorney for the appellee in the above-entitled cause, it is ordered that an appeal to the Supreme Court of the United States from the decree entered herein by this court on January 8, 1895, be, and the same is hereby, allowed.

Know all men by these presents that we, Brooke Mackall, as principal, and Le Roy Tuttle, Jr., and Henry E. Davis, as sureties, are held and firmly bound unto Westel Willoughby in the full and just sum of one thousand dollars, to be paid to the said Westel Willoughby, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between the said Westel Willoughby, as appellant, and the said Brooke Mackall, as appellee, the same being numbered 361, a decree was rendered against the said Brooke Mackall, and the said Brooke Mackall having been allowed an appeal to the Supreme Court of the United States to reverse the said decree in the aforesaid suit, and a citation directed to the said Westel Willoughby, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Brooke Mackall shall prosecute his said appeal to

effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BROOKE MACKALL. [SEAL.]
LE ROY TUTTLE, JR. [SEAL.]
HENRY E. DAVIS. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved and the appeal made a supersedeas by—
M. F. MORRIS,
Associate Justice Court of Appeals, D. C.

(Endorsed:) No. 361. Westel Willoughby, appellant, *vs.* Brooke Mackall. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 3, 1895. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Westel Willoughby, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Brooke Mackall is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this third day of May, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Copy served upon me May 3, 1895.

W. WILLOUGHBY.

(Endorsed:) No. 361. Court of Appeals, District of Columbia. Filed May 3, 1895. Robert Willett, clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WESTEL WILLOUGHBY
vs.
BROOKE MACKALL. } No. 361.

And now comes Westel Willoughby, the appellee in the appeal to the Supreme Court of the United States, and moves the court to rescind the approval and order appearing upon the bond of appellant filed in this cause May 3, 1895, which is in the following words, to wit: "Approved and the appeal made a supersedeas by M. F. Morris, associate justice Court of Appeals, D. C.;" and also, if such motion be not granted, that the words "and the appeal made a supersedeas" may be stricken therefrom or adjudged to be of no effect, on the ground that such approval and order were made without authority of law.

W. WILLOUGHBY,
By A. A. BIRNEY, *Counsel.*

To H. E. DAVIS, Esq., *Counsel for Appellant:*

Please take notice that the above motion will be called up for hearing before the court on Thursday, the 9th day of May, 1895, or as soon thereafter as counsel can be heard.

W. WILLOUGHBY,
By A. A. BIRNEY, *Counsel.*

(Endorsed:) Court of Appeals, D. C., April term, 1895. No. 361. Westel Willoughby, appellant, *vs.* Brooke Mackall. Motion to rescind approval of bond and to rescind order for supersedeas. Court of Appeals, District of Columbia. Filed May 4, 1895. Robert Willett, clerk.

THURSDAY, *May* 9, *A. D.* 1895.

* * * * * * *

WESTEL WILLOUGHBY, *Appellant,*
vs.
BROOKE MACKALL. } No. 361.

The hearing on the motion to rescind the approval of the bond to the Supreme Court of the United States is assigned for Monday, May 13, 1895.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 87, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Westel Willoughby, appellant, *vs.* Brooke Mackall, No. 361, January term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of May, A. D. 1895.

[Seal of Court of Appeals of the District of Columbia.]

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WILLOUGHBY *vs.* MACKALL. } No. 112.

Mr. Justice SHEPARD delivered the opinion of the court:

1. It is contended in support of the demurrer that the payment of the $5,000 was contingent upon the recovery of some amount as mesne profits in cause No. 8118, and that, as no recovery was had in said cause, the complainant was entitled to nothing for his services in any of the cases.

At the time the contract was made the litigation had been for some time in progress, and the right of the attorney to reasonable compensation for the value of his services had been fixed, and he had received some payments on account thereof, the amounts of which are not stated. The contract made at this late date was apparently for the purpose of a definite understanding and settlement of the fee to be paid the attorney, as well as the exact nature of the services he was to perform.

We cannot agree to the construction given this instrument by the learned counsel for appellee on the argument

of the cause. We do not think that Willoughby's right to any compensation whatever for services in all three suits was made to depend wholly upon success in No. 8118. He was not to be paid $5,000 *out* of the proceeds of said cause, but "a sum *equal to 50 per cent.* of such money as may be adjudged to the said Mackall, as aforesaid, and which may be recovered in said suit of Mackall *vs.* Richards and others, in equity No. 8118, by way of mesne profits, damages, and costs, *provided that if such 50 per cent. be less than $5,000 the said Willoughby shall have such sum of $5,000,* and shall have a lien therefor upon said judgment and property as may be recovered against the said Richards."

It seems reasonably clear that Willoughby was to have at least $5,000 for his services in all three cases. If successful, according to his expectation, in No. 8118, he might receive more than this sum, but under no circumstances was he to receive less. Suppose he had recovered, say, $2,500 as mesne profits and damages in that case, would it be contended that he was to have that and no more? Yet if his compensation was limited to the money recovered in that cause, how was he to obtain his fee of $5,000, which was expressly stipulated for in the event that 50 per cent. thereof should be less than that amount? It seems clear enough, then, that if the claim in No. 8118 should fail altogether, or fall short of a recovery of $5,000, it was to remain a charge against Mackall, either in whole or in part, according to the result.

The construction given this contract is not to be strained in the interest of Mackall on account of the relation of client and attorney existing at the time between him and Willoughby. The demurrer must be taken for the time being as an admission that there was no advantage taken of the client to make an unjust contract. If in his answer the defendant should make specific allegations to the effect that the relation of attorney and client was in fact abused to his detriment, then it would devolve upon the complainant to show that the charge was fair and reasonable and the contract made with a full understanding of the situation at the time on the part of the defendant. This rule of law with respect to contracts between attorney and client applies in their enforcement and not in their interpretation.

2. The intention of the parties not to limit the complainant's compensation to the contingency of success in No. 8118 alone is, we think, made more clear by the clause creating the lien which is sought to be foreclosed. The recital is:

"And the said Willoughby shall have a lien therefor upon said judgment and property as may be recovered against said Richards."

We think this should be interpreted as if the word *such* had been inserted before the word *property* in the foregoing rather awkwardly worded sentence, thereby making it to read "upon said judgment and such property as may be recovered," etc.

There was reason for using both of these words, *judgment* and *property*, in this sentence. Judgment is singular, and evidently refers to cause No. 8118, in which alone a money recovery was prayed for. If that judgment should amount to nothing or to a sum less than $5,000, then complainant was to be secured by a lien on the property that might be recovered. There is no sound reason for limiting this general term property to such as should be recovered alone in No. 8118. The contract recites the three cases in which are involved the whole of lot 7, in square 223, and No. 8118 is the last one upon the docket in the order of institution. The larger part of the lot was involved in the two cases and the value of that which was recovered therein amounted to about $50,000. It is not apparent why Willoughby should have limited his lien for his services to the property to be recovered in one only, and it does not appear that he did so.

3. It is contended, however, that his lien is incapable of enforcement because it does not identify with sufficient certainty the property to which it attaches. The only uncertainty lies in determining how much of the property in litigation is subject to the lien stipulated in the contract. There is no want of certainty in the identification of the property itself, but only in the construction of the contract creating the lien. Having held that the lien was intended to be given upon all of the property that might be recovered of Richards, the identification of this is easy enough by reference to the final decrees in these cases. "That is certain which may be rendered certain."

For the errors above pointed out in the proceedings below the decree will be reversed, with costs to the appellant against the appellee Mackall, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

[Endorsed:] Willoughby *vs.* Mackall.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

WILLOUGHBY *vs.* MACKALL. } No. 361.

Mr. Justice SHEPARD delivered the opinion of the court:

This is the second appeal in this case. The first was by the plaintiff, Westel Willoughby, from a decree sustaining a demurrer to his bill (*Willoughby vs. Mackall*, 1 App. D. C., 411). We then held, reversing the decree below, that the plaintiff Willoughby was entitled under the agreement sued on to a fee of $5,000, and to have the same declared a lien upon all the property that may have been recovered in the three cases named in said agreement as Nos. 2373, 8118, and 8184 on the docket of the supreme court of the District of Columbia, in which he had acted as counsel for the defendant, Brooke Mackall. After the cause was remanded defendant Mackall answered the bill and filed a cross-bill, in which he attacked the agreement as having been extorted by duress and undue advantage. Upon the hearing both the bill and cross-bill were dismissed, and plaintiff alone has appealed. Our opinion remaining unchanged as to the proper construction of the agreement, the only question to be considered is whether any property was in fact recovered in any of the cases aforesaid in the sense of the word as used in the agreement, to which the lien for security of plaintiff's fee could rightfully attach. It appears from the evidence that Mackall once had title to what is known as lot 7, in square 223, fronting on New York avenue and Fourteenth street, in the city of Washington, as shown in the accompanying plat, within the lines A, C, E, F.

[Here follows the diagram printed on page 118 of the Record in No. 281 on the current docket of this court.]

Many years ago Mackall had a house built on the corner C, which is called throughout the litigation the Palace market. Two separate mechanics' liens were foreclosed upon a part of the lot, including the Palace market, and under these and a judgment at law against Mackall owned by one Al-

fred Richards the marshal undertook to make a sale of part of the lot. Richards became the purchaser for an amount which paid off the mechanics' liens and a part of his judgment. He took possession of the building and claimed and exercised in certain ways possession of part of the unoccupied lot. The description of the lot as sold and conveyed by the marshal to Richards was very inaccurate and uncertain. He claimed under said deed all that portion of the lot within the lines A, C, D, G.

On May 2, 1871, Richards, claiming the unpaid balance on his judgment, joined with other judgment creditors of Mackall in filing a creditors' bill against him to subject all of lot 7 "not before sold by the marshal" to their judgments. This is cause numbered 2373. Mackall did not deny the recovery of the judgments, but set up certain defenses thereto, not necessary to mention, and denied having an equitable title to the lot, etc. May 1, 1873, a decree was passed to the effect that the said Mackall had title to all of the said lot not sold by the marshal, and trustees were appointed to make sales thereof in satisfaction of the judgments of the plaintiffs. This decree was affirmed on appeal to the Supreme Court of the United States. The trustees made a sale which was set aside upon exceptions to their report, and the court then made another decree, attempting to settle the lines of the marshal's conveyance and ordering sale of "all that part of lot 7, in square 223, lying south of a line drawn from a point of Fourteenth street 44 feet south of the northeast corner of said lot and running thence parallel to the line of New York avenue to the west line of the said lot, this decree to be construed as not determining any question of title to any portion of said lot 7, lying north of said line." The plaintiff Willoughby was not retained in this litigation until after the foregoing sale was made, and he represented Mackall in the exceptions to that report and in all the subsequent litigation. The effect of the foregoing decree, made by the general term, was to fix the area of the lot conveyed by the marshal to Richards within the boundaries A C D G, without, however, determining whether that conveyance was valid.

On November 24, 1884, the Supreme Court of the United States, to which that decree had been appealed, reversed it, holding that the proper boundary line of the conveyance by the marshal was the line of the walls of the Palace Market

building, viz., B, C, D, H, and ordering the sale to be made of all the lot outside thereof. The Court declined to express an opinion as to the validity of the marshal's sale to this smaller part of the lot, because not properly involved in the case (*Mackall vs. Richards*, 112 U. S., 369). Whilst this suit was not for the settlement of the title or the recovery of possession of the lot or any part thereof, its necessary result was to settle the question of title in Mackall's favor to all that part of the lot outside the walls of the Palace market, even leaving the final title to that part unsettled. The decision was conclusive of Richards' title under the marshal's deed, his only claim of title to the remainder of the disputed lot, which is comprised within the lines A, B, H, D, G. In the statement of the case before the Court, Mr. Justice Harlan said: "This suit involved the title to that part of square 223, in the city of Washington, designated as lot 7," &c. (page 369).

Before this case was determined, to wit, April 11, 1882, Mackall instituted suit No. 8118, in equity, to set aside the marshal's deed under which Richards claimed the Palace market and all of the lot contained in the parallelogram A, C, D, G, and to recover possession and the mesne profits thereof. This bill was dismissed in special term, but sustained upon appeal to the general term, from whence Richards appealed to the Supreme Court of the United States. That Court, without inquiring into the merits, reversed the decree of the general term and ordered the bill dismissed because of complainant's laches in the institution of his suit. (*Richards vs. Mackall*, 124 U. S., 183.)

Cause No. 8038 is of no importance in the present case. The practical result of all of the litigation was, then, to settle in Richards, as against Mackall, the title to the lot on which the Palace Market building stands, B, C, D, H, and in Mackall, as against Richards, the title to all of that part of the lot contained in the lines A, B, H, D, G. This part of the lot has been estimated to be worth about $50,000.

Whilst Willoughby's right to the sum of $5,000 as a fee for his services in all of this litigation is not now denied, it is contended, as was so held in the court below, that his lien therefor is limited to such property as was actually recovered and cannot attach to this lot or any part of it, because it was not actually *recovered* in any of said suits, the only

suit for actual recovery being No. 8118 aforesaid, which was defeated, as we have seen.

We think that the word recovered should not be so restricted in its meaning. There is no reason why the agreement should not be liberally construed. Its object was to give Willoughby a lien on the property which might be recovered—that is to say, secured or realized—by and through the litigation conducted by him, offensive and defensive. Richards, recognizing, as he was bound to do, that the title to the lot, outside the walls of the building, had been settled adversely to his claim, abandoned any possession he might have had and submitted it to Mackall. Mackall entered without opposition and has since held peaceable, undisturbed, and unquestioned possession. In the general sense of the word, he actually recovered his land through the services rendered by Willoughby in cause No. 2373. He failed of recovery in 8118, through which he lost the title to the Palace Market lot, and Willoughby the contingent interest in the mesne profits expected to be recovered therein, in addition to the land. Willoughby's fee, to the extent of the $5,000 claimed, was not contingent, but certain and fixed. Having as a matter of fact, through success in No. 2373, settled the title to a very valuable part of the lot and enabled Mackall to retake peaceable possession thereof without further litigation necessary to assure him therein, we think his lien attached thereto under the construction of the contract declared on the former appeal and which is adhered to.

The decree must be reversed, with costs to the appellant, and the cause remanded to the court below, with direction to pass a final decree, in accordance with the foregoing opinion. And it is so ordered.

[Endorsed:] Willoughby *vs.* Mackall.

Opinion of Mr. Justice Cox.

In the case of Willoughby *vs.* Mackall, the bill is filed to enforce a lien upon certain property for the amount of a fee which Mackall had agreed to pay the complainant.

The agreement is as follows:

This agreement made this 10th day of April, 1883, between Brooke Mackall Jr., and Westel Willoughby;

Witnesseth, that whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of Alfred Richards and others *vs.* Brooke Mackall and others, No. 2373, in equity, in the supreme court of the District of Columbia, and which is now pending before the Supreme Court of the United States, for the defendants in the said suit, and whereas he is counsel for the plaintiff in the case of Brooke Mackall Jr., *vs.* Alfred Richard and others, in equity No. 8118, in the supreme court of the District of Columbia, and he is also counsel for the defendant in the case of Leonard Mackall and others *vs.* Brooke Mackall Jr., No. 8038, in equity, in said court.

Now, therefore, in consideration of the services of said W. Willoughby as such counsel, performed and to be performed, he hereby agreeing to conduct the above-mentioned suit of Richards and others No. 2373, to a final determination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow and pay to him as compensation for such services, in addition to what has already been received by him a sum equal to fifty per cent. of such money as may be adjudged to the said B. Mackall, Jr., as aforesaid, and which may be recovered in said suit of Brooke Mackall, Jr., *vs.* Richards and others, in equity, No. 8118, by way of mesne profits, damages and costs, provided, that if such fifty per cent. be less than $5,000, the said W. Willoughby shall have such sum of $5,000, and the said W. Willoughby shall have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards; and the above compensation shall be received by said W. Willoughby in full satisfaction for his services in the aforesaid matters in controversy as counsel, he to have no other compensation for such services.

It is provided further, that if said causes No. 8038 and 8118 are not finally determined in the court sitting in special term, and an appeal is taken, for such services as may be necessary in appellate courts an additional compensation shall be allowed, which shall hereafter be agreed upon by the parties, and he shall also be allowed an additional compensation for services in No. 2373, which may be necessary after the decision of the Supreme Court of the United States upon the points now pending therein.

Witness the following signatures and seals in duplicate.

B. MACKALL, JR. [SEAL.]
W. WILLOUGHBY. [SEAL.]

Now it turns out that nothing was recovered in the suit 8118, of Brooke Mackall against Richards and others, and a judgment was rendered against the complainant. The question is whether this lien which the complainant was to have upon the judgment in that suit "and property as may be recovered," applies to other property than that which was sought to be recovered in that suit; the present bill is to establish that lien upon other property.

It must be borne in mind, all the time, that this suit 8118 was a bill filed with two objects; first to declare the marshal's sale to Richards to be entirely void, and to recover back from him the property sold, and secondly, to recover damages as mesne profits received by him while in possession under this alleged marshal's sale. The property is lot 7 in square 223 in the city of Washington. Richards had purchased a part of that property at the marshal's sale but the part was *undefined* at that time. Mackall claims that the whole sale was void and it was sought in this action, 8118, to set it aside and recover back whatever Richards claimed under it.

In order to get at the meaning of the parties, we have to look at the surrounding facts. There had been an agreement as far back as 1880, between these two parties, very similar to this. At that time, there was a common-law action in ejectment pending, to recover this property, and the agreement as to fees was in almost the language of this, with the exception that the amount to be paid was to be equivalent to *twenty-five per cent.* of what should be recovered. In that also nothing was said about a lien on the property. That ejectment suit failed for want of proper parties, and

subsequently No. 8118 equity was instituted and that was pending at the time that this second agreement was entered into. I have before me a draft or *projet* of an agreement which was the foundation of that actually entered into; it is in the handwriting of Mackall himself. It is a matter of some controversy between the parties as to who first prepared the agreement. It does not make any difference who did; it is sufficient for my purpose to say that this agreement, or draft of agreement, with blanks in it, was in the handwriting of Mackall, and in order to fully understand it, it is just as well to see what it means and how far it was altered. In this agreement it was provided that Mackall agrees to allow and pay to him, the complainant, as compensation for such services in addition to what has already been received by him a sum equal to — per cent. (that was filled out with "fifty"), of such sum as may be adjudged to said Mackall, Jr., as aforesaid. (Just what "as aforesaid" means is not perfectly clear. It evidently refers to a suit which was described as 8118.) It then proceeds "and which may be recovered in said suit of Brooke Mackall against Richards and others in equity No. 8118 by way of mesne profits and costs," "and said W. Willoughby shall have a lien therefor upon such judgment as may be recovered against said Alfred Richards."

That was the form in which the agreement was originally drafted. Now let us see what that meant: "shall have a lien therefor upon such judgment as may be recovered against said Richards." Not very grammatically expressed, but the meaning is evident that it was to be a lien upon the judgment that may be recovered in said suit against Alfred Richards. That was the only thing that was referred to to which the word "aforesaid" could have reference. It is already recited that he was to have a sum equal to fifty per cent. of what may be recovered in the suit against Richards and others. Now he was to have a "lien upon the judgment that may be recovered in the suit," and that was altered by interlining after "judgment" the words "and property as may be recovered, &c.," so that, interpreting it as I have done, that addition would make it simply mean that he was to have a lien therefor upon the judgment and such property "as may be recovered in said suit." That is the natural interpretation of this contract as altered and amended by the complainant himself, and the question

arises, Could it have meant anything else? It does not matter, in my judgment, what the Supreme Court finally decided in this case or in 2373. The question is what the parties understood at the time the agreement was made. As I read it, it was an agreement to allow a lien upon a judgment "and property that might be recovered" in suit 8118. Could it have meant anything else at that time, as is claimed?

The only suit to which reference could have been had was 2373, because the other suit was the one between the Mackalls, to which Richards was no party at all. At the time this agreement was entered into, suit No. 2373 was a suit by judgment creditors against Mackall in which Mackall was not an actor but the defendant. A decree had been entered in that suit against him in favor of judgment creditors, for the sale of a certain piece of property, and no decision had been made at all with reference to the title to this property on which it is sought now to establish this lien. That was not a suit in which Mackall was an actor or in which he could have recovered anything at all against Richards, but on the contrary, as I say, was a recovery against him. It could not have been thought that two suits were pending for the recovery of the same property. The suit No. 8118 was for the recovery of all that property; and was the only suit that could have been in contemplation by the parties because they speak of the judgment and property to be recovered as against Richards.

As the facts were at that time, it seems to me, the thing in contemplation of the parties as the subject-matter of this lien, could not have been anything else but the property that was involved in this 8118. What was involved in the final determination of 2373 in the Supreme Court is not material. The Supreme Court held that the creditors ought to have had a larger decree against Mackall. They sought to obtain a decree to sell all of Mackall's property that had not been sold to Richards. The court below had designated the piece of property which should be sold to satisfy the creditors. The Supreme Court held incidentally that Mackall was entitled to more than was embraced in the decree below, and that the decree in favor of the creditors against him ought to have embraced additional ground. Now, that decree of the Supreme Court was not in favor of Mackall; incidentally, the Court in making that decree in

favor of the creditors, held that he was entitled to more property than was embraced in the decree below, but on that decree, he could not have recovered anything; he could not have had execution to put him in possession of it. If Richards had chosen to hold on to it, Mackall would have had to enter suit to get possession of it; he could not by virtue of that decree have recovered a foot of ground and did not.

So that in no technical or proper sense could it be said that he recovered anything in that suit. But, as I said before, it is not a question what the Supreme Court finally thought or did in that case: it was what was in contemplation by the parties when this agreement was made. It seems to me very clear and unavoidable that the parties had reference only to the property involved in this case 8118. The complainant relies upon the opinion of the Court of Appeals. The Court of Appeals had to decide, as their principal question, whether this agreement gave to Willoughby a fee entirely contingent upon the success of the suit 8118. The language is a little peculiar in that respect. It is that if the fifty per cent. recovered in that suit should be less than $5,000, Willoughby should have the $5,000 anyhow. Hence the Court of Appeals understood that to mean that if he should recover nothing at all in that suit, still he was to have $5,000 absolutely. Then to fortify their conclusion, by way of argument, they proceeded to show that the lien contemplated in this agreement was not confined to that case but extended to all the other cases also. This was suggested as an additional reason why that fee should be deemed contingent. But they drew their conclusion from an assumed state of facts. The bill was demurred to and the facts upon which they decided the demurrer were those set out in the bill. Now the bill did not exhibit the proceedings in this case at all; it described them very generally, only. I think the Court of Appeals had an erroneous impression as to the nature of these causes; I think upon examination of their opinion it will appear that they thought Mackall was an actor in all of these cases and could recover in all of them.

The bill, in describing these cases states that equity cause 8118 was a suit of Brooke Mackall against Richards to set aside a conveyance of the land on which the Palace Market building stands, &c., to recover mesne profits, &c.

Equity cause 8038, it says, resulted in a final decree *sustaining the title* of Mackall as to all of lot 7, square 223, except that part on which the Palace Market building stands.

We will naturally infer from that statement that Mackall had his title established, as an actor, in that case. It goes on to say that said equity cause No. 2373 was decided in the Supreme Court of the United States, that the result of that decision was that said Brooke Mackall *recovered in that cause against the said Alfred Richards* all that part of lot 7 in square 223 lying north of the line beginning at a point 44 feet south of the northeast corner of said lot on 14th street, &c.; such recovery being of the value of more than $50,000.

After discussing the question whether the fee was contingent or nor, they go on to say: "The intention of the parties not to limit the complainant's compensation to the contingency of success in No. 8118 is, we think, made more clear by the clause creating the lien;" and, reciting the clause, they say that it substantially means the same thing as if the word "such" were inserted before the property, "*such* property as may be recovered." They say, "There is no foundation for limiting this general term property to such as should be recovered alone in No. 8118. The contract recites the three cases in which are involved the whole of lot 7 in square 223, and No. 8118 is the last one upon the docket in the order of institution. The largest part of the lot was involved in the two other cases, and the value of that which was recovered therein," (that is, in the other two cases,) "amounted to about $50,000. It is not apparent why Willoughby should have limited his lien for services to the property to be recovered in one only, and it does not appear he did so."

They apparently thought that he had recovered in the other two cases and there was no reason why, therefore, the lien should be limited to this case. So that it seems to me their views as to the question of this lien were founded upon a mistaken assumption of facts. Nor did they have before them the facts I have referred to, relating to the preparation of a draft of agreement, the blanks, and the filling up of the blanks, and the interlineation by the complainant, which I think throw light on the question.

My conclusion therefore is that this agreement does not establish a lien upon anything except the property that might be recovered against Mackall in 8118. There are

various defenses set up in the case, none of which in my judgment are sustained. One defense is, that the agreement was virtually extorted from the defendant by duress, but it seems to me that it was entered into so deliberately, and acquiesced in so long, that the defendant has no show at all to sustain that contention. Nor do I think he has sustained the allegation of misrepresentations as to the terms of the contract. I had occasion also to look into that question before, and I think that there is nothing in it.

My conclusion is based upon the interpretation of the agreement itself, and I think the bill will have to be dismissed on that ground.

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JAMES H. McKENNEY,
CLERK.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 281.

BROOKE MACKALL, APPELLANT,

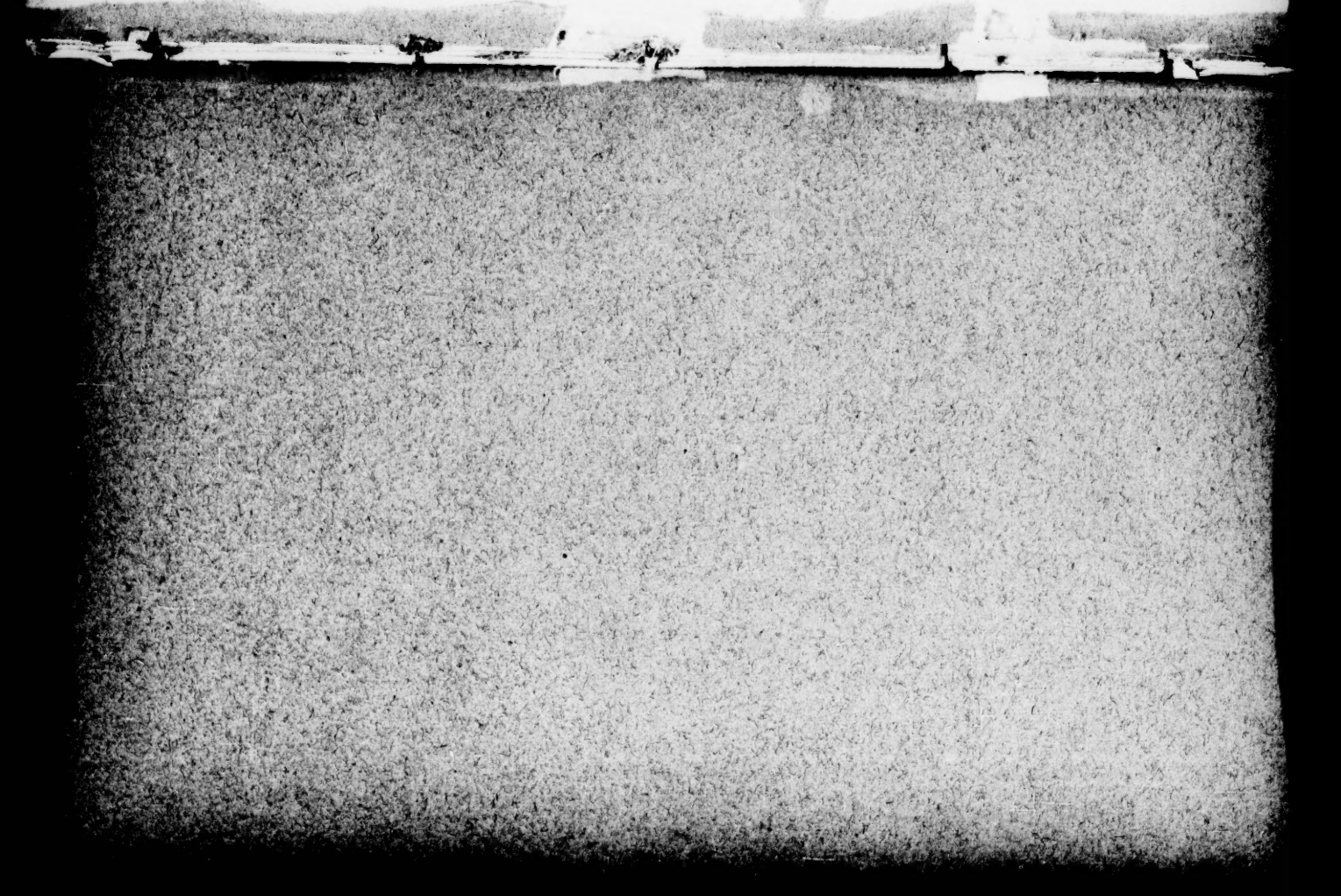
vs.

WESTEL WILLOUGHBY, APPELLEE.

BRIEF FOR APPELLEE.

ARTHUR A. BIRNEY,
Counsel for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

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BRIEF FOR APPELLEE.

I.

When the first of these cases, No. 274, was reached it was ordered passed to be heard with No. 281 and *upon the record in that cause.* This was evidently upon the supposition that the records are alike, that the questions of law and fact to be determined in the two cases are the same, and that the printed record in No. 281 would serve to present all that need be considered to determine No. 274. Were this not so the court would be in the position of violating one of its own rules of practice, for paragraph 3 of rule 8 provides:

"No case will be heard until a complete record containing in itself and not by reference all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court shall be filed."

Notwithstanding the order that No. 274 be heard only upon the record in 281, counsel for appellant has printed what he calls an appendix to his brief, consisting in part of what he claims to be in the record in No. 274, and asks the court to consider these unauthenticated, alleged extracts as if parts of the only record (No. 281) which the court has said it will hear.

This would seem to be a confession that No. 274 cannot be tried upon the only printed record before the court. It may be claimed that the alleged copy of certificate found on page 7 of such appendix should secure the consideration of the alleged extracts, but this certificate refers only to certain pages "numbered from 1 to 87" and not to these extracts, and does not purport to verify them; but as, under the order, the court is to consider only the record in 281, it is not easy to see how the supposed extracts and certificate can be looked at. On the question of proper authentication of the record see—

Blitz *vs.* Brown, 7 Wall., 693.

The cases not alike.—A glance at the record in 281 and at appellant's argument as found in his counsel's brief will show that the questions involved in the two appeals are wholly different, and it *has not been attempted* to show that they are similar. The brief argues at length the supposed merits of a case, whereas the *only question* which the record in No. 281 presents is whether the Court of Appeals erred *in refusing to entertain an appeal* from a decree passed pursuant to its own mandate and in strict conformity (as it found) to its opinion. (See opinion, Rec., p. 152, and order of dismissal, p. 154.)

That the decree passed was in conformity with the opinion and mandate of the Court of Appeals is expressly admitted by counsel here. (Brief, p. 7.)

This action of the court is not assigned for error.

The only assignments of error are to the decisions of the

court upon records *which are not before this court*, and which were *res adjudicata* when the order of dismissal was made.

Northern Pacific R. R. Co. *vs.* Ellis, 144 U. S., 458.

To illustrate:

(*a.*) There is no authentic record before the court of the decree of the Court of Appeals of January 8, 1895, except as it is referred to in the mandate (pp. 145, 146);

(*b.*) Or of the opinion of that court, necessarily a part of the record and required by law to be filed;

(*c.*) Or that an appeal was ever taken from the decree of January 8, 1895.

None of these records are presented to this court except in the so-called appendix, in which is also printed the alleged opinion of Mr. Justice Cox (pp. 14 to 20, Appendix), which is not part of any record anywhere and was never filed in any court.

The clerk of this court has not revised or authenticated this appendix, and for this reason it could not be distributed as a part of the record nor considered as such.

Again, the very foundation of the entire argument of counsel for appellant is not found in this record—that is, the contract between the parties which is the subject of the litigation.

On page 2 of Appellant's Brief he has set out what he says is the agreement in question as set forth on page 144 of the Record.

This is a mistake. The paper on page 144 is merely an unperfected and unsigned *draft* of an agreement. On its face it shows no signatures and several unfilled blanks. The *actual agreement between the parties is not in the record at all.* It will be observed that the answer does not admit the agreement to be as set forth in the bill, but "for greater certainty he refers to the original thereof." (Rec., p. 6, par. 1.)

The result is that counsel is endeavoring to get a construction of an agreement which is not in the record and not before this court.

Again, we assert that in No. 274 is a motion to dismiss the appeal on the ground that the money decreed to be paid was paid and satisfied to the appellee after the taking of the appeal, and that there is no substantial question before the court, according to the case of *Mills vs. Green*, 159 U. S., 651.

This motion, upon being considered, was postponed until the final hearing of the cause.

In his brief (not in the appendix) counsel for appellant has set forth what he alleges to be an affidavit of his client in the record in No. 274 relating to this payment (pp. 24 to 28). How this unauthenticated paper can be considered is not made clear. The case is to be heard upon the record, not upon extrinsic matters found only in the briefs. Besides, it is apparent that he has printed only a part of the record of the matter, entirely omitting the evidence of the appellee in support of the motion to dismiss the appeal, and even the motion itself and the grounds on which it was made.

How can such question be considered upon this record in No. 281?

We assert, also, that the evidence in the two transcripts is not the same. The record for the first appeal from Mr. Justice Cox was made up by the present appellee, and this is part of the record in No. 274, while the record for the second appeal was made up for the Court of Appeals by the appellant here. The two records are very dissimilar, there being a difference of 84 pages in the testimony.

There are material papers in No. 274 which are not in this record, especially two briefs prepared by appellee showing his position in the case of Richards *vs.* Mackall to be materially different from the claim made by appellant. A considerable part of appellant's argument is based on these briefs, but he himself admits that one of them is not in this record. He says (p. 17), "This brief also is not in the

record, but is on file in this court"—that is, though it is in No. 274, and though he has printed other papers from that record, he has omitted to print this paper. We allege that this omitted brief is very material to show the exact position taken by this appellee as counsel in that cause.

This court, then, has not before it what the Court of Appeals acted on in No. 274, and should not consider it, but should dismiss the appeal therein for failure of appellant to comply with the rules as to payment of costs and printing.

No. 281.

The only question, then, is: Was the Court of Appeals right in its order dismissing the appeal of the appellant Mackall from the decree signed by Justice Cox, such decree being in conformity to the opinion and mandate of the same Court of Appeals? (Rec., pp. 152, 153, 154.)

As already stated, this is *not assigned as error*, and the assignments made (Appellant's Brief, p. 8) are wholly foreign to case 281. *That case is ignored* by appellant's counsel, no allusion being made to it in his brief.

Error not being assigned of the order of dismissal by the Court of Appeals, there is nothing before the court which can be considered, and the appeal should be dismissed.

THE COURT OF APPEALS RIGHT.

The Court of Appeals, having looked at the decree appealed from and found it to be exactly what it had ordered, properly dismissed the appeal.

II.

In The Northern Pac. R. R. Co. *vs.* Ellis, 144 U. S., 458, it was held that where a demurrer had been overruled by the State supreme court of Wisconsin upon appeal and

answer filed on leave and hearing had, the cause could not be heard again upon the question involved in the demurrer, and upon appeal being taken to this court motion was made to dismiss the appeal upon that ground, and this court, *dismissing the appeal*, says:

"When the case was presented to the court on the appeal of the railroad company from the order of the lower court upon demurrer the rights of the parties were *res judicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down and it had *no power* upon a second appeal to review that judgment. This is the settled rule in Wisconsin *and in this court*."

See also Clark *vs.* Keith, 106 U. S., 464.
Supervisors *vs.* Kennicott, 94 U. S., 498.
Chaffin *vs.* Taylor, 116 U. S., 567.
Hickman *vs.* Fort Scott, 141 U. S., 415.

The opinion of the Court of Appeals in this case (p. 152) is quite conclusive upon this point, but we beg to submit the following extracts from our brief before that court, as follows:

In Browden *vs.* M. Arthur, 7th Wh., 58, the cause had been remitted to the court below by mandate, and it was brought up on a second appeal and a motion made for rehearing. The court said:

"It was too late to grant a rehearing in a cause after it had been remitted to the court below to carry into effect the decree of this court according to its mandate, and that a subsequent appeal from the circuit court for supposed error in carrying into effect such mandate brought up only the proceedings subsequent to the mandate, and did not authorize *an inquiry* into the merits of the original decree." Approved in Noonan *vs.* Bradley, 12 Wall., 121.

In Maguire *vs.* Tyler, 17 Wall., 253, the court say:

"None of the questions which were before the court in the first writ of error can be *reheard or re-examined* upon the second writ, as it would lead to endless litigation."

See also Sizer *vs.* Maney, 16 How., 98.

In Himely *vs.* Rose, 5 Cr., 314, the court say:

"Nothing is before this court but what is subsequent to the mandate."

In Stewart *vs.* Salamon, 97 U. S., 361, the court say:

"An appeal will not be entertained by this court from a decree entered in the circuit court or other inferior court, in exact accordance with our mandate upon a previous appeal. *Such a decree when entered is, in effect, our decree, and the appeal would be from ourselves to ourselves.*"

In the dissenting opinion Clifford, J., says:

"The *re-examination* cannot extend to anything that was decided in the antecedent appeal or writ of error."

In "The Santa Maria," 11 Wh., at page 446, the court say:

"What was formerly before the court cannot again be drawn *into controversy.*"

This court dismissed the second appeal in Mackall *vs.* Willoughby, No. 447, upon precisely the same grounds as are contended for in this case. (23d Wash. Law Rep., 261.)

If this case had not been remanded to the court below and an application had been made for a rehearing after the expiration of the term, the court would have said at once that a rehearing was beyond its power, and would not have entertained the motion; but this is just what is now asked of this court, and the situation could not be changed by anything done in the meantime in the lower court. The application could not be entertained.

An appellate court cannot grant a rehearing in a case which has been remitted to the court below.

Peck *vs.* Sanderson, 18 How., 42.
Browder *vs.* M. Arthur, 7 Wh., 58.
Warner *vs.* Joy, 17 Wall., 253.

Surely the court will not listen to an argument that the court below erred in doing what the mandate of this court prescribed and in applying the law as it was laid down by this court, as this court would again say is the law if it should allow such argument to be made.

The court below had the judicial power to decide directly contrary to the law as laid down by this court in some other case, but in this case it did not have the power to act contrary to the decision of the court, for it did act and must have acted according to the direct mandate of the court, which was the imperative law of this case for the court.

See this subject fully discussed in 21st Am. Dec., 118, note.

III.

The appeal in this case to the Court of Appeals was not only the second appeal upon the same questions which had been formerly decided by that court, but, as to the questions arising upon the sufficiency of the bill itself, which sets forth the agreement sued upon, it was the third appeal.

It will be noted that the opinion of the court states that there were two former appeals (p. 152). The court will find, on inspecting the record (p. 5), that a demurrer was interposed to the bill, which demurrer was sustained and the bill dismissed by the lower court; but the Court of Appeals reversed this decree, overruling the demurrer, and remanded the cause for further proceedings.

There are cases which hold that, where a demurrer to the bill or declaration has been overruled and subsequently plea or answer is filed, this constitutes a waiver of the demurrer.

Aurora City *vs.* West, 7 Wall., 82.
Watkins *vs.* U. States, 9 Wall., 759.
U. States *vs.* Boyd, 5 How., 51.
Jones *vs.* Thompson, 6 Hill, 621.
Campbell *vs.* Wilcox, 10 Wall., 410.

In other cases, however, Teal *vs.* Walker, 111 U. S., 242; Bausman *vs.* Blunt, 147 U. S., 647, and So. Pac. Co. *vs.* Denton, 146 U. S., 202, it has been held that, where the right to raise the question again *is reserved in pleading* and the demurrer is upon the ground that the bill or declaration does not state facts sufficient to show a cause of action, such plea or answer is not a waiver of the demurrer.

However this may be in the court where the suit is originally brought, and though such court, upon final hearing of the cause, may consider any error that may have been formerly committed, yet, where the demurrer has been overruled *by an appellate court* and the cause has been remanded by such appellate court to the original court for further proceedings, such original court is then acting upon the mandate of the appellate court, and it is *beyond its power* to sustain such demurrer and to act in disregard of such mandate, and therefore it can commit no error in passing a decree in conformity with such mandate.

Even, then, if this court should not dismiss the appeal for want of jurisdiction, it must hold that the decree appealed from in this record was entirely right and that such decree should be affirmed.

IV.

As a matter of precaution and not waiving our claim that the appeal should be dismissed or the decree below be affirmed on the grounds stated, we present our views on the merits of the decree of the supreme court of the District of Columbia passed in obedience to the mandate and in question in No. 274. This cannot be done without difficulty, for, as already shown, the foundation for all argument, *the agreement between the parties*, is not in the record, nor is there here the opinion of the Court of Appeals construing such agreement; but, in addition to the ample support to the decree found in the decisions of the Court of Appeals in this

case (Willoughby *vs.* Mackall, 1 App. Cas. D. C., 411, and Same *vs.* Same, 5 App. Cas. D. C., 162), we submit the following extracts from the briefs for the appellee before that court on those hearings, the page references being changed:

This was a suit in equity based upon a sealed agreement between the appellant, a lawyer, and the appellee, his client, for compensation for services as counsel in certain equity suits named as Nos. 2373, 8118, and 8038, by which appellant was to have as such compensation "a sum equal to 50 per cent. of such money as may be adjudged to the said B. Mackall, Jr., as aforesaid and which may be recovered in said suit of Brooke Mackall, Jr., *vs.* Richards and others, in equity, No. 8118, by way of mesne profits, damages, and costs, provided that if such 50 per cent. be less than $5,000 the said W. Willoughby shall have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards." (Rec., p. 2.)

The bill alleges, among other things, that no recovery was had in No. 8118, but in No. 2373 the result of the decision was that the said Brooke Mackall recovered in said cause against the said Alfred Richards all that part of lot 7, in square 223, lying north of a line beginning at a point 44 feet south of the northeast corner of said lot on Fourteenth street, and running thence parallel to New York avenue to the west line of said lot, except the ground on which the Palace Market building stands, such recovery being of the value of more than $50,000 at the time thereof (par. 5).

On page 118 is a diagram of said lot 7, in which the property above described is designated by the letters A, B, H, D, G.

The appellant claims that because this was recovered as the result of the decision in No. 2373 he is entitled to a lien upon it for the compensation agreed upon of $5,000, and for that reason he is entitled to relief in equity.

Demurrer was interposed to this bill, which was sustained in the court below, but was overruled by this court (1 Appeal Cases D. C., p. 411), and the cause was remanded to the court below. Thereupon appellee filed his answer, in which he takes issue upon the above allegations in these words:

"That the result of the said decision was that this defendant, according to the true meaning, intent, and purpose of the said cause against said Alfred Richards he denies" (par. 5, p. 7).

In paragraph 10 he claims that the agreement contemplated a lien only upon such property as might be recovered in cause No. 8118, and that the property involved in cause No. 2373 was not, nor any part of it, recovered against said Richards (p. 11).

This court having overruled the demurrer to the bill, the question submitted to the court below was whether the above-described property was recovered "according to the true meaning, intent, and purpose of the said agreement." The court below decided this adversely to the appellant.

A cross-bill was filed to set aside the agreement, and considerable testimony was taken as to this, but this was dismissed, and from this decision no appeal was taken; for which reason such cross-bill and testimony relating thereto is omitted from the record. (All this testimony is in this record.)

The court below erred:

1st. In construing the agreement of April 10, 1883, upon which the suit was brought, in not giving a lien upon any property recovered from Alfred Richards.

2d. In holding that the defendant did not recover any property as the result of the decision of the said cause No. 2373 from the said Richards according to the true meaning, intent, and purpose of said agreement.

3d. In dismissing the bill of complaint for the foregoing reasons.

V.

The record shows that No. 2373 was a creditors' bill filed in 1873 by Richards and others against Mackall and others to subject that part of lot 7 which had not before been sold by the marshal to Richards to the judgments held by Richards and others against Mackall. Previous to the filing of this bill Richards had by proceedings under a mechanics' lien against the Palace Market building purchased it and claimed that by such purchase he had obtained not only the building, but all the property included in the parallelogram, A, C, D, G (p. 118). In cause No. 2373 Richards had first obtained a decree to sell all of said lot "not heretofore sold by the marshal" (p. 110), and this had been affirmed by the United States Supreme Court; but this decree did not define what amount had before been sold by the marshal. Sale was made under this decree.

It was at this point that appellant was first employed. He immediately filed exceptions to such sale, which were sustained, and thereupon an order was made that before sale be made the amount to be sold must be definitely ascertained by some proper legal proceeding (p. 111). The cause was referred to the auditor to ascertain the proper boundary line, and upon his report coming in the court, in special term, December 11, 1879, adjudged and decreed that such line commenced at a point on Fourteenth street and ran *parallel with New York avenue* to the west line of said lot, thereby holding that Richards was entitled, as he claimed, to the entire parallelogram, A, C, D, G (p. 112).

An appeal was taken from this decree by Mackall, and April 5, 1881, the court in general term directed all to be sold south of such line parallel to New York avenue, not determining any question of title to any portion of said lot

north of said line, but without reversing the decree in special term (p. 112).

From this an appeal was taken by Mackall to the United States Supreme Court; motion was made to dismiss this appeal, which was overruled, and this appeal was pending at the time of the making of the agreement in this suit, April 10, 1883.

November 24, 1884, the United States Supreme Court reversed the decrees of the court below, and held that the proper boundary line was the walls of the Palace Market building, and directed the sale of all the lot except the ground on which this building stood (p. 113). This case is very plainly and fully described in Richards *vs.* Mackall, 112 U. S., 369.

The sale was not made because, the title being considered as settled, Mackall was able to raise money upon it to satisfy the judgments. Richards, regarding this decision as final against him, abandoned all claim and gave up without further contest all except the Palace Market building (pp. 16, 24, 25, 43, 44).

Cause No. 8118 was a suit by Mackall to set aside the deed under which Richards claimed the Palace Market building and all of the parallelogram, A, C, D, G, and to recover possession of it and mesne profits (pp. 2, 7). (Richards *vs.* Mackall, 124 U. S., 183.)

The defendant, for the purpose of sustaining his claim as to the interpretation of the agreement, put in evidence, under objection, a prior agreement of 1880 (p. 90, and briefs of appellant in cause 2373, pp. 116 to 124). There is also in the case an unsigned draft of the agreement of April 10, 1883 (p. 144), with interlineations (pp. 70, 71).

Evidence was taken in regard to the possession of Richards at the time of the agreement of April 10, 1883, which will be fully presented in argument hereafter.

VI.

It was argued in the court below, and held by the court, that notwithstanding the interpretation which had been put upon this agreement by this court, yet the recovery of land contemplated by the parties was what might be recovered in cause 8118, and did not apply to any land recovered in No. 2373.

In Willoughby *vs.* Mackall, 1 Appeal Cases, at p. 415, this court says:

"The recital is, and the said Willoughby shall have a lien therefor upon said judgment and property as may be recovered against said Richards. We think this should be interpreted as if the word *such* had been inserted before the word *property* in the foregoing rather awkwardly worded sentence, thereby making it to read 'upon said judgment and such property as may be recovered,' etc."

In the next paragraph the court gives the reasons for such construction. Among other things it says, "There is no sound reason for limiting this general term *property* to such as shall be recovered alone in No. 8118. It is not apparent why Willoughby should have limited his lien for services to the property to be recovered in one only, and it does not appear that he did so."

VII.

It was claimed, however, and held by the court below that this interpretation should be different from that given by this court because of certain facts appearing to the court below that were not before this court.

It was claimed on the former hearing before this court that there is an ambiguity appearing on the face of the instrument itself—that is, that there is a patent ambiguity. This question was decided by the court, holding that, ac-

cording to the face of the instrument, the appellant was entitled to a lien upon such property as might be recovered from Alfred Richards, and that this was not limited to such as might be recovered in cause No. 8118. Now, this construction cannot be changed by any facts or surrounding circumstances which of themselves would render this meaning doubtful or ambiguous.

1 Greenl. Ev., sec. 297.
Seitz *vs.* Brewers' Manf. Co., 141 U. S., 510.
Bradley *vs.* Wash., Alex. and Georgetown Packet Co., 13 Pet., 89.

In support of the claim of appellee, reference was made to the contract made between the parties of December 11, 1880, and to the unsigned draft of the agreement of April 10, 1883 (p. 144), and to what appellant argued in briefs filed by him in No. 2373 in 1881, two years before. These would be clearly incompetent for any purpose. Suppose they were offered in a court of law as evidence to explain the meaning of the contract of April 10, 1883. They would undoubtedly be excluded, if objected to, and would not be allowed to be considered at all by the jury. The same rule should be applicable here. Parol evidence to show how the parties understood the transaction is inadmissible to explain and qualify what is in writing. Other writings cannot be read unless they appear to be parts of the same transaction (Bailey *vs.* R. R. Co., 17 Wall., 96). These, then, cannot be considered at all. (Van Ness *vs.* Mayer, &c., 4 Peters, at p. 285.)

But suppose they are considered by the court. They do not fairly throw any light upon the meaning of the agreement of April 10, 1883, at least to show that a different interpretation should be made from that given by this court.

The situation in 1880, the date of the first agreement, was very different from the situation in 1883. At that time there was no suit of 8118 pending. There was an ejectment suit pending, which was brought to determine the boundary line

in controversy, *the very question involved also in cause No.* 2373 (p. 121).

It will be seen that in the agreement of December 11, 1880, the property in contemplation was the same afterwards appearing in controversy in both causes 2373 and 8118. Now, it appears by comparing the two agreements that the agreement of April 10, 1883, was drawn, with the agreement of December 11, 1880, before the draftsman. In that of 1880 there was a lien provided for upon anything which might be recovered as mesne profits, embracing, of course, the mesne profits of all the property north of the disputed line; but when the agreement of 1883 was drawn the original draft at first provided for a lien only upon the judgment, but the change was made by interlineation so as to make a lien not only upon the judgment, but also upon the property that might be recovered from Richards. In making the change, then, from the original draft there was evidently an intention to make the lien not only upon the judgment that might be recovered from Richards, but also upon property that might be recovered. Now, at that time the property in controversy and which was in the possession of Richards included not only that embraced in cause 8118, but also that in 2373. This property was held by Richards *under the same claim of title*, viz., that obtained by sale under a mechanics' lien. Mackall was then claiming that the title to all of it should be settled in one suit, to wit, the ejectment suit. At the time of the agreement in 1883 the same question was involved in 8118 as in the ejectment case—namely, the validity of the marshal's deed—and this necessarily involved the title to the property in 2373—that is, all north of the disputed line—so that the title was involved both in cause 2373 and in 8118. (This argument made before the Court of Appeals in what is now 274 may appear unintelligible, because the original agreement is not here so that comparison could be made.)

Now, in saying that the lien shall be not only upon such

judgment as might be recovered, but also upon such property as might be recovered from Richards, what reason can be given or even suggested for limiting this to such property as might be recovered in 8118? If such had been the intention, it would have been very easy to have said so, and as this is the covenant of the defendant, if there be ambiguity in it, it must be construed against him. The agreement does not require that the property should be recovered in cause 2373, and at that time it was not known whether if there should be a recovery it would be in 8118 or in 2373.

When it is seen how the cases involved the same property, how they were connected with each other, how they both related to a single claim of Richards under one title, it is still plainer why this court should say as it did, "There is no sound reason for limiting this general term, property, to such as should be recovered alone in No. 8118."

The court will see that the original unsigned draft in its terms gave no lien except upon the judgment, but that this was changed by simply inserting "and property." This in part, at least, accounts for the awkwardness of the phrase, but it shows no intention to make a distinction between the ground covered by the Palace Market building and the rest of the disputed area.

If, then, the agreement of 1880 and the original draft of that of 1883 could be considered at all, nothing can be found in them to change the construction which the court has put upon the agreement, but they would tend to confirm such interpretation.

VIII.

It was argued in the court below that the briefs made by the complainant in opposition to the motion to dismiss the appeal of Mackall in the United States Supreme Court, filed in December, 1881, show that he did not have in mind recovery of property upon which it is now claimed there is a lien.

Of course, this would be clearly incompetent, being in the nature of parol statements as to what was in his mind some years before the agreement was drawn or executed.

They would also be incompetent as being nothing but arguments used for a certain purpose, entirely different from anything contained in the agreement. For these reasons they should not be considered, and can be considered only in violation of all well-settled rules of evidence.

But if they could be considered they do not show any such intention or thought as was claimed. (Two of the briefs that were in No. 274 are omitted from this record.)

In the case there had been a decree that Richards was entitled to the property upon which a lien is now claimed, and also a decree that all south of the disputed line should be sold to satisfy the judgment in cause 2373. Mackall had appealed from these decrees, and complainant in his behalf was simply resisting a motion to dismiss such appeal. For that purpose he argued that the court below had erred in making these decrees, and took the ground that the court had erred for two reasons: in assuming to decide the disputed line at all, and, second, that the court in general term had made such a decree as to practically cause a sacrifice of the property. Now counsel for appellee here takes the ground that because of the argument made by appellant on the motion to dismiss the appeal, that the court did not have authority to decide the boundary lines, therefore it was in the mind of the person making such argument that the title was not in controversy in that suit. We submit that such an inference is unfounded, that because when a decree adjudging title is made against the party, his counsel argues that the decree was not only wrong, but that the court did not have jurisdiction to make it, therefore that such counsel should be considered as thinking that such title was not really in controversy in such suit. It is not reasonable to be inferred, especially when the court held, as it did in this case, that the title was actually in controversy,

that it was a question properly in issue, and that such decree was wrong, and that the court had jurisdiction and reversed such decree.

But the court will further see that complainant as counsel in that case argued, not only that the decree was wrong for want of power to make it, but because the court in general term had directed the sale without having the boundary line settled (this brief not in this record, but in 274). Complainant, for the purpose of the argument, took the ground that really there had been no determination, treating the decree of the general term as having reversed the decree, and thus putting the court in the position of having ordered a sale with the boundary line entirely unsettled, and he quotes a large number of authorities to show the impropriety of this. He does not deny that it was within the power of the court to have sent the cause to a jury to ascertain the facts in the cause. If he did, he must subsequently have changed his mind, for, as a lawyer, he must have known that as to Mackall his rights could not be determined in a court of law, because as the case then appeared he had only an equitable title. Even then, if because he argued in this brief, in 1881, that the question ought to have been decided in an ejectment case for the purpose of preventing the dismissal of the appeal, it is not, therefore, to be held that he had such an opinion in 1883, especially as the argument was wrong, and the United States Supreme Court subsequently decided it to be wrong, and did decide, in effect, what was the true boundary line, and, reversing the decree of the court below, did say that the issue was a proper one in the cause and necessary to be decided therein. (Richards *vs.* Mackall, 112 U. S., 369.)

Surely to consider what counsel argued in these briefs in 1881, for certain purposes not now clearly apparent to the court, as evidence of his intentions in a deliberate sealed agreement made in 1883 for entirely different purposes is not only in violation of the well-settled principles of law as

to considering prior declarations of the parties as to intentions, but it is very unfair to a lawyer to hold him bound as to his opinions of the law in an argument before the court, when he is called upon afterwards to act in relation to the same questions of law, but where the purposes and object of such acts are entirely different and his personal rights are to be seriously affected. It is impossible for the court to do justice in considering these briefs as throwing light upon the construction of the agreement in question. It is impossible for one to infer what was in the mind of the complainant when he executed the agreement of 1883 from what he argued in behalf of his client upon an entirely different occasion and when the purposes of such argument were so different from the purposes of this agreement.

IX.

It is undeniable that, even if the recovery of the property might not be had in cause No. 2373, the *ultimate recovery* of such property was in contemplation; and in order to effect this it was absolutely necessary that the decree then in force, adjudging the boundary line to be as claimed by Richards, should be set aside by the Supreme Court of the United States in that cause where alone it could be done. This necessity was obvious. Whether it were set aside upon the merits or for want of power to make it, no ejectment suit or other proceeding would be of any avail unless this were done. Now, because the court did decide the question upon its merits, and thus make it final, and in such a way as to cause Richards to acquiesce in it and surrender the property without further litigation, and thus enable Mackall to recover the property as he claims, is it just to hold that appellant thereby lost his lien because he effected the object with less trouble and expense to his client than was or might have been expected? Surely the court cannot find any equity in this.

X.

It is claimed that there was no *recovery* in a sense contemplated by the agreement, because there was no direct adjudication that Richards should surrender the property or process of the court obtained putting him out of possession. It was urged in the court below that there is a technical meaning to the word *recover*, which requires a judgment of a court directing that Richards should surrender possession.

But a case like this is entirely different from the cases where such adjudication may be required, as, for example, where a suit is brought by a vendee of land against a vendor upon a breach of covenant for quiet possession. In such case the mere acquiescence of the vendee in a claim made by a third party and his surrender of possession in consequence thereof would not, for obvious reasons, be binding upon the covenantor. He is entitled to an adjudication of the court. There is no breach of the covenant unless the covenantee is actually ousted by reason of such adjudication, and in such case there must be an actual *recovery* by force of law.

But no such reasons are applicable in a case like the one at bar. If a lawyer contracts with a client for a fee in case he can "recover" for him a tract of land, he is entitled to his fee if he effects such recovery in any way, either by a suit or by satisfying the other party that the law is against him and thus causing him to surrender possession. The object is attained just as well in this way as in any other.

But in this case there was an actual recovery *by reason of the adjudication made by the court*, which was entirely decisive as to the rights of the parties, and so admitted to be, and so acted upon by both parties. Such adjudication was just as conclusive and effective as is the decision in a test case brought as to one tract of land to determine the title to

many tracts held by the same claim. There would be in such a case an adjudication only as to one tract, but if all were recovered by reason of the decision of the one case the lawyer who had contracted to recover all would be entitled to his fee the same as though he had brought suit for every tract.

XI.

It is claimed by the appellee that there was no recovery, for the reason that, as contended, Richards was not in possession of the property when the agreement was made.

Whether he was or not does not depend altogether upon the oral testimony of the parties. It depends upon established facts, there evidently being a difference in the minds of the witnesses as to what really constitutes possession.

It is a conceded fact that in 1870 Richards, when he purchased the property at the corner, at the marshal's sale, *claimed* that the property purchased by him included all the lot north of the line running from a point 44 feet south of the northeast corner of the lot westward parallel to New York avenue. It is admitted that he took possession of the building in 1870, and, this being so, the natural inference would be that he took possession *according to his claim*, there being nothing to prevent it (p. 67). The deed of the marshal which he procured and under which he entered covered indisputably a portion of this area, it being different in its terms from the description in the lien and in the levy of execution.

In Richards *vs.* Mackall, 124 U. S., 183, the court say that Richards took possession "*under this purchase.*"

Richards had the lot immediately subdivided by the surveyor of the District, such survey embracing the property claimed, and placed such survey upon record in the surveyor's office (p. 68).

He assumed control and had it for a while, putting ashes upon it, etc. (p. 67).

There was a fence along New York avenue when he took possession, and he repaired it at least on one occasion. Mackall says that he himself also repaired it occasionally, but it was not until after the decision of the Supreme Court that he tore it down and built it as it is now. Richards put a lock on the gate and *held the key to it* (pp. 67, 68).

Appellant, who was counsel for Mackall, and Webb, who was counsel for Richards, both testify that Richards was in possession until it was surrendered by him, after the decision in 1884 (pp. 16, 43). It is claimed that this is not on their personal knowledge, but they could not possibly have been mistaken as to how it was regarded by the parties. A decree of the court had been made in No. 2373, December 11, 1879, adjudging that Richards was entitled to this property (p. 112), which decree stood unreversed until November 24, 1884, when it was overruled by the Supreme Court of the United States (p. 113). When it was so reversed Richards surrendered his claim and gave up possession (pp. 16, 43 to 45).

In May, 1886, Mackall filed a cross-bill in cause 2373, in which he says on oath that "Richards, in 1870, took possession of a considerable portion of the premises involved in the suit, and has ever since held possession thereof until the present time, and still continues to hold the same" (p. 115). This could not possibly mean any other property than that on which claim of lien is herein made. Richards actually enclosed with a fence 867 feet of this ground and kept it enclosed until after the decision of the court, and upon which there could be no question of such possession. But it would be unreasonable to find that only this 867 feet was the subject of this cross-bill; but if it were this would be sufficient to sustain the jurisdiction of the court of equity to fix a lien upon it and to justify full relief.

The testimony of appellant is that this cross-bill related to the property in which the lien is here claimed (p. 25), *and there is no contradiction of this statement.*

Mackall declared in the strongest manner that Richards was in the possession of this, for he had caused a suit to be brought *in ejectment* against him for this identical property and to determine its true boundary line (p. 120).

Surely all this must be sufficient to show that Richards was in possession, as he confessedly claimed to be at the time of the agreement of April 10, 1883.

In Ewing *vs.* Burnett, 11 Peters, 41, the syllabus is as follows:

"An entry by one on the land of another is or is not the ouster of the legal possession arising from the title, according to the intention with which it is done. If made under a claim or color of right, it is an ouster; otherwise it is a mere trespass. In legal language the *intention* guides the entry and fixes its character. It is well settled that to constitute an adverse possession there need not be a fence or building or other improvements made. It suffices for the purpose that visible, notorious acts are exercised over the premises in controversy for 21 years after an entry under a claim or color of title."

The same doctrine is declared in Ellicott *vs.* Pearl, 10 Peters, 412.

According to this, it cannot reasonably be disputed that Richards, by his entry in 1870 and claim of ownership according to the marshal's deed and by these acts, which are undisputed, did maintain an adverse possession for many years. If, then, Richards was legally in possession, that could not be taken away by force or without his consent. That could only be done by a suit at law.

Now, Mackall claims that he obtained possession in 1882 by reason of acts performed by him in that year. He says he went there *vi et armis* in 1882 and drove Richards away with a hatchet and repaired the fence. He produces a record of his arrest for the assault committed at that time (pp. 97, 98) and puts on some witnesses to show that he did work upon the fence at that time (pp. 81, 85). He also puts

in a record of a bill filed by Richards to enjoin him from interfering with the property, in which Richards swears that he was in possession. in order that he might also file his answer, in which he swears that he (Mackall) was in possession (p. 134). This answer, signed and sworn to by him, is plainly not competent proof for him for any purpose and ought not to be considered at all; but even were it evidence it only shows that Richards and Mackall differed as to what they deemed to constitute possession. There is no real difference as to the existence of the facts which we claim to constitute an adverse possession.

It is attempted to make this answer evidence because it was written out by the appellant as Mackall's counsel, but it will be a novel rule of evidence to hold that a mere draftsman of a statement of facts to be signed by another or a writing made out by a lawyer upon a statement of his client to be signed by him makes such statement evidence against the draftsman or lawyer.

Now, if Richards was in possession, as he undoubtedly was for a long time, he could not be ousted from such possession by force, but only by a suit at law.

"If the lawful owner suffer the right of entry to be once lost, he could no longer restore himself by his own act, but must have recourse to his action at law, and, indeed, even where it has not been lost, as it but seldom happens that the wrong-doer would tamely submit to be turned out without force, the owner, if his object was to gain the actual possession and enjoyment of the land, was generally obliged to have recourse to such action and to call to his aid the process of the law to restore him to that right which he could not obtain by peaceful means without it."

Den *vs.* Morris, 2 Halst., 6; 11 Am. Dec., 505.

The attempted entry by Mackall in 1882 as described by him was clearly a forcible one. This is indictable at com-

mon law (18 Am. Dec., 139, note). In such cases the court say, in Dilworth *vs.* Fee, 52 Mo., 133:

"Nothing is more firmly settled by repeated decisions of this court than in actions of this kind there can be no inquiry into the title of the property involved; that the law forbids a forcible entry, and that it is immaterial whether the intruder is a mere trespasser or enters under a paramount title, for if he has the right to the possession he must resort to the authority of the law to obtain it" (citing a large number of authorities).

The witness Webb says that after this controversy in 1882 "it was understood that the matter might be deferred for a while," and the case shows that no further action was had in the cause or by Mackall until after the reversal in 1884 of the decree, which had given this property to Richards, when, as Mackall says, "After the decision I tore the thing down and built the structure that is there now, the paneling" (p. 68). This shows how Mackall regarded the situation himself, doing nothing further until such decision of the court.

Surely it must be apparent that there was a recovery of this property in the sense contemplated by the agreement. The title to this property was the only question pending in No. 2373 at the time this agreement was executed, and it cannot reasonably be considered that this was not in the minds of the parties at the time, and that the recovery which was had was the recovery that was intended according to the true intent and meaning of such agreement.

XIII.

If there should be a reasonable doubt in the mind of the court, such doubt should be resolved in favor of the appellant, for at all events he is entitled to the compensation claimed from appellee, and the only question is whether he

shall have this lien as a means to secure and recover such compensation. There can be no possible wrong to the appellee in holding that this property shall be security for a debt honestly and indisputably due; while to hold otherwise might result in enabling the appellee to defeat the appellant of his just claim. This is a question entirely between the appellant and the appellee, and does not present such equities as might exist between creditors who were contending for a prior lien.

XIV.

We claim, first, that the appeal should be dismissed; second, if not dismissed, the decree below should be affirmed, because it was a second appeal, without bringing up any new question, and, third, if not affirmed upon that ground, it should be affirmed because it was in the first instance decided properly upon its merits.

We also claim that the appeal should be dismissed in No. 274, first, because the record has not been printed, and, second, because it does not appear here and cannot appear that there was any error in the record in that cause, and no errors appear to have been assigned in that cause and no briefs have been filed therein.

All of which is respectfully submitted.

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